No. 86-679

In The Supreme Court of the United States

OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.
Petitioner

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG
E. Edward Hood
Counsel of Record
Terrence E. Haggerty
Joan H. Lowenstein
300 Federal Center Building
206 South Fifth Avenue
Ann Arbor, Michigan 48104
(313) 663-3366
Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Does the public have a First Amendment right of access to documents produced in pretrial and trial stages of civil proceedings where no good cause has been shown to seal those documents, as well as a First Amendment right to intervene and assert that right of access?

PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing before the Supreme Court of Michigan:

Plaintiffs-Appellants
- Booth Newspapers, Inc.
- Midland Publishing Co.
- Michigan Press Association

Defendant
- The Honorable David Scott DeWitt

Defendants-Appellees
- Dow Chemical Company
- Consumers Power Company
- Bechtel Power Corporation
- Bechtel Associates Professional Corporation

PARENTS, SUBSIDIARIES AND AFFILIATES OF THE PETITIONER

Petitioner, Booth Newspapers, Inc., is an assumed name for The Herald Company. The parent, subsidiaries and affiliated corporations of The Herald Company are:

Advance News Service, Inc.
Advance Publications, Inc.
Alfred A. Knopf, Inc.
Al-Pine Cable TV, Inc.
API Systems Group, Inc.
Ballantine Books Limited
BEI Graphs Corp.
Bernard Leser Publications Pty., Ltd.
Birmingham News Company (The)
Brides House, Inc.
Conde Nast International, Inc.
Conde Nast Publications, Inc.
Conde Nast Publications Limited (The)
Conde Nast Verlag GmBH
C.V. Construction, Inc.
Daily and Sunday Herald, Inc.
Del-Com, Inc.
Diversified Printing Corporation
DuBois Area Cable TV, Inc.
Edizioni Conde Nast S.p.A.
Electric Delivery System, Inc. (The)
Evening Journal Association (The)
Filmfax Productions Corporation
Les Editions Conde Nast S.A.
Glamour Magazine, Ltd.
Grand Rapids Herald, Inc.
Houma Cablevisions, Inc.
Jacksonville Television Cable Company
Median Supply Company, Inc.

Mercury Express, Inc.
Mississippi Press Register, Inc.
Mitchell Publishing, Inc.
Mobile Press Register, Inc. (The)
Newark Morning Ledger Co.
Newberry Award Records, Inc.
The New Yorker Magazine, Inc.
NYKR Company, Inc.
O.C. Air, Inc.
Oregonian Publishing Company
Parade Publications, Inc.
Patriot-News Co. (The)
Plain Dealer Publishing Co.
Random House Direct Marketing, Inc.
Random House Disc Corporation
Random House, Inc.
Random House of Canada Limited
Republican Company (The)
RMP Media, Inc.
Street & Smith Publications, Inc.
Tatler Publishing Company, Ltd.
Televogue Limited
Times Picayune Publishing Corp. (The)
TNY Company, Inc.
Upstate Community Antenna, Inc.
Videovogue Limited
Vision Cable Communications, Inc.
Vision Cable Communications of Morehead City, Inc.
Vision Cable of Craven, Inc.
Vision Cable of North Carolina, Inc.
Vision Cable of Pinellas, Inc.
Vision Cable of Shelby, Inc.
Vision Cable of South Carolina, Inc.
Vision Cable of Sumter, Inc.

Vision Cable Southern Systems, Inc.
Vision Cable Television Company
Vogue Model Agency Limited
Vogue Studio Limited
Wine & Food Publications, Ltd.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES PAGE

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

MISCELLANEOUS

No.

In the Supreme Court of the United States
October Term, 1986

IN RE BOOTH NEWSPAPERS, INC.
Petitioner

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

Booth Newspapers, Inc., petitions for a Writ of Certiorari to review the Order of the Michigan Supreme Court entered April 28, 1986 denying Booth's Application For Leave To Appeal the decision of the Michigan Court of Appeals entered on September 3, 1985.

OPINIONS BELOW

The Michigan Supreme Court has denied without opinion the Application for Leave to Appeal in an order reported at 425 Mich. 854 (1986). The opinion of the Michigan Court of Appeals is reported at 145 Mich. App. 396, 377 N.W.2d 868 (1985) and is reproduced in Appendix A. The opinion of the Midland County, Michigan Circuit Court, entered on August 4, 1984, is not reported and is reproduced in Appendix B.

JURISDICTION

The Order Denying Booth Newspapers' Application For Leave to Appeal the decision of the Michigan Court of Appeals was entered April 28, 1986. A timely Motion for Reconsideration of that Order was denied on July 28, 1986, and this

petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Michigan General Court Rule 306.2 provided in relevant part:

> *Orders for the Protection of Parties and Deponents.* Upon motion seasonably made by either party or by the person to be examined and upon reasonable notice and for good cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers and counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the

> court; or the court may make any other order which justice requires to protect the party or witness from annoyance, undue expense, embarrassment, or oppression. The court shall not order the production or inspection of any writing prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial or production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice, except as provided in sub-rule 310.1(4). The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories.

Michigan General Court Rules 307.4, 309.5 and 310.1, which applied the protective order provisions of Michigan General Court Rule 306.2 to Deposition of Witnesses Upon Written Interrogatories, Interrogatories to Parties and Documents and Things for Inspection, are reprinted in Appendices H, I and J, respectively.

Michigan General Court Rule 209, which provided for intervention in an action, is reprinted in Appendix K.

STATEMENT OF THE CASE

The petition challenges the propriety of the Michigan courts' unprecedented decisions denying public access to evidence admitted at a civil trial, documents on file with the court, and pretrial discovery materials in a litigation of the utmost public importance involving the cost and safety of a nuclear power plant. The procedural history underlying the courts' actions is rife with instances of procedural irregularity including a complete failure to make any findings of good

cause for the denial of access, *sua sponte* decisions to enter protective orders even though no party requested such orders and an unsolicited and unsupportable ruling precluding all public scrutiny of the material at issue until the distant time, if ever, that all appeals in the litigation are decided. As shown below, this Court must review the Michigan courts' rulings because they are directly at odds with the requirements of the First Amendment to the Constitution, as interpreted by this Court, and because a conflict among various federal Circuits and highest state courts on the matters at issue in this case requires resolution.

On December 17, 1967, Consumers Power Company ("Consumers"), a regulated public utility, and Dow Chemical Company ("Dow") announced plans to build the world's first dual-purpose nuclear power plant in Midland, Michigan. Bechtel Power Corporation and Bechtel Associates Professional Corporation ("Bechtel") was the general contractor. The twin-reactor plant was to provide Dow with electricity and steam and Consumers' customers with electricity. The estimated cost was $267 million.

Consumers and Dow signed a steam contract in 1974. As early as 1975, however, Dow began to question the ability of Consumers to perform its obligations set forth in the contract in timely manner and made its concerns known to Consumers. The cost estimates for completion were revised several times, ultimately being in excess of $1.6 billion. To satisfy Dow, Consumers agreed in 1980 to allow Dow to withdraw from the contract if the plan was not operational by December 1984.

Almost three years later, Consumers announced it was unable to meet the scheduled completion date. On July 18, 1983, Dow withdrew from its contract and filed suit against Consumers in the Midland County, Michigan Circuit Court, seeking a declaratory judgment and charging Consumers with a series of misrepresentations and non-disclosures of material

facts in violation of its common law and statutory duties to Plaintiff. Consumers denied these allegations and counterclaimed for damages for breach of contract.

In April 1984, Consumers announced it would increase cost estimates of the plant to $5.7 billion and slashed its common stock dividend nearly in half to raise funds for construction. Three months later, the utility abandoned the project and sought immediate rate hikes from the Michigan Public Service Commission.[1]

Trial did not begin until October 1984. Prior to trial, the parties engaged in extensive discovery. Dow, Consumers and non-party Bechtel produced approximately 1.5 million pages of documents and took numerous depositions. Virtually all of the pre-trial discovery documents were marked confidential and withheld from the public by authority of five protective orders entered by the Midland County Circuit Court.

At the inception of the litigation, the parties and non-party Bechtel stipulated to protective orders to prevent disclosure of documents claimed to be confidential trade secrets. The first protective order ("First Order" — Appendix C), dated October 20, 1983, concerned the named parties. By its terms, extensive rights were given to mark briefs, pleadings, depositions and other documents as confidential. Once Dow, or Consumers, at its sole discretion, designated documents as confidential, those documents were placed in a sealed envelope and could not be opened without an order of the court. The circuit court held no hearing to determine if there was good cause to

---

[1] On September 17, 1986, Dow and Consumers announced an agreement to convert one unit of the abandoned nuclear plant into a natural-gas-driven plant. Midland County Circuit Judge David Scott DeWitt indefinitely recessed Dow's half-billion-dollar, two-year-long lawsuit against Consumers. By this time, Consumers had spent more than $4 billion on the failed nuclear plant. It is seeking to recover $2.1 billion by raising electrical rates to customers. The first phase of the cogeneration project will require an additional $400 million, while the second phase will require $150 million.

enter the First Order nor did the court file contain an affidavit or petition to support a finding of good cause.

On December 2, 1983, the circuit court entered a stipulated protective order ("Second Order" — Appendix D) to cover non-parties. Its terms were similar to the First Order, and, once again, the court held no hearing to determine good cause.

Non-party Bechtel, unhappy with the scope of the Second Order, sought a more expansive protective order from the trial court. On April 6, 1984, the court entered a substantially broader protective order ("Third Order" — Appendix E) with respect to Bechtel documents. The Third Order embraced not only trade secrets but also "competitively sensitive commercial or financial information" which, if disclosed, might prejudice the business of Bechtel. It also allowed counsel for Bechtel to designate entire depositions and deposition transcripts as "confidential." The parties stipulated to this Third Order, but, unlike the circumstances surrounding entry of the first two orders, a hearing was held on January 13, 1984. A transcript of the hearing, however, shows there was little reference to "good cause." The starting point for both the court and the parties was that a protective order would enter, regardless of the existence of good cause. The hearing was restricted to the scope and breadth of the forthcoming protective order without consideration of the propriety of further limiting access to judicial documents.

On July 16, 1984, Judge DeWitt made an unprecedented move. Without request of any party, the court forwarded a letter to all counsel in the Dow-Consumers suit, informing them that Booth Newspapers ("Booth") had sought access to discovery materials on file with the court. This inquiry, according to the judge, "revealed that no formal order has been entered in accordance with the understanding arrived at with counsel or our instructions to the clerk." He then invited any of the parties to move for an order sealing all depositions,

which he would enter *ex parte*. Consumers took the judge up on his offer. The fourth protective order ("Fourth Order" — Appendix F) was signed the next day and entered on July 18, 1984. This blanket order, which sealed all depositions, whether confidential or not, made no mention of good cause for such closure. No hearing to establish good cause was held nor was any pleading filed with the court to support entry of this judicially-initiated document.

The impetus for entry of the court's *ex parte* Fourth Order was a series of inquiries on July 15, 1984 by reporters and attorneys for Booth, seeking permission to examine non-confidential depositions. Initially, the court refused access on the basis of Michigan General Court Rule 306.2. The court conveyed its position through a law clerk to the reporters and legal counsel for Booth. Aware of the media's strong interest in these proceedings, and the media's opposition to restricted access, the Court became an active participant and thrust itself into the controversy. Shortly thereafter, it entered the *ex parte* Fourth Order.

Booth filed a Motion to Intervene in the litigation on July 20, 1984, basing its request on Michigan General Court Rule 209, either as a matter of right or on a permissive basis. At the same time, Booth moved to vacate all protective orders. On July 25, 1984, the Michigan Press Association and Midland Publishing Company joined with Booth in seeking the same relief. The circuit court scheduled a hearing on the two motions for July 30, 1984. Prior to the hearing, Consumers and Bechtel each filed briefs in opposition to both motions. Dow filed a pleading in support of vacating the *ex parte* Fourth Order of July 18, 1984. In this same pleading, Dow opposed vacating the First, Second and Third Stipulated Orders and was silent as to the media's request for intervention.

Booth's motions asserted its First and Fourteenth Amendment rights of access to the public documents being withheld. Counsel for petitioners and all interested parties appeared for

the July 30, 1984 hearing. A special time had been arranged with the court for oral argument. Petitioners traveled a considerable distance to be present to present to the court their arguments in favor of access. Judge DeWitt refused to allow oral argument. He advised he would decide the pending motions on the basis of briefs submitted to the court.

On August 8, 1984, the circuit court issued its opinion denying the media intervention, relying solely on Michigan General Court Rule 209. Failing to address any of the Constitutional claims, the court stated that the applicants had no interest in the subject matter of the case within the meaning of the court rule, had no interest in the relief to be obtained in the case, and could not be bound by the judgment in the case. The court's opinion did not address the request to vacate the protective orders. The court did state that while it found intervention "not proper under the circumstances," the media's interest might "be sufficient to support a Writ of Superintending Control in the [Michigan] Court of Appeals."

After this ruling, on August 17, 1984, petitioners filed a complaint for an Order of Superintending Control in the Michigan Court of Appeals. The complaint requested an order directing Judge DeWitt to vacate all existing protective orders and to grant petitioners the right to intervene for the limited purpose of addressing requests, if any, for future protective orders. Consideration of the complaint was scheduled for September 11, 1984.

Before the scheduled hearing, and with full knowledge of petitioners' claims, Judge DeWitt entertained yet another protective order ("Fifth Order" — Appendix G) on August 31, 1984, which would expand and broaden the variety of discovery documents shielded from the public.

As was the case with the earlier protective orders, the Fifth Order was entered amidst procedural irregularities. Consumers had filed a motion on August 17, 1984 requesting a Protective Order. The Notice of Hearing accompanying the

motion set forth no specific date. The trial court privately scheduled a hearing for August 24, 1984.

Without actual notice, Judge DeWitt, on August 24, 1984, conducted a telephone conference with attorneys for Dow and Consumers. A reporter for the Midland Press was invited to participate. No other reporters had access to or were informed of the conference call. Dow objected to entry of yet another order and, on August 31, 1984, filed a written response to Consumers' motion. In its response, Dow stated that Consumers' announced purpose in filing the motion was to prevent disclosure of information to the public. On August 31, 1984, Judge DeWitt signed and filed the Fifth Order entitled "Order Concerning The Use Of Discovery Materials." The order proscribed the parties from using any information obtained through discovery for any purpose other than trial preparation, unless such information had been made a part of the public record. The scope of the order was not limited to confidential information.

On January 23, 1985, a three judge panel of the Michigan Court of Appeals heard oral argument on the Complaint for Superintending Control. On September 3, 1985, the court issued its decision denying access to the public and the media. *Booth Newspapers, Inc. v. Midland Circuit Judge*, 145 Mich. App. 396, 377 N.W.2d 868 (1985). Relying on *Oklahoma Press Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984), the three judge panel held that plaintiffs lacked standing as to documents exchanged between the parties which had not been filed with the court. 145 Mich. App. at 400, 377 N.W.2d at 870. The court stated that although plaintiffs may have alleged an injury in fact, such alleged injury could not be fairly traced to the action of the court in entering the protective orders nor would it likely be redressed by a favorable decision. *Id.* Even if it were to lift the protective orders, the court held, it did not follow that plaintiffs could compel defendants to disseminate documents in their possession. *Id.*

As to documents on file with the court, including those documents actually introduced into evidence at trial, the Court of Appeals held that while the matter is pending, the media does not have any absolute right of access to the court file. 145 Mich. App. at 403, 377 N.W.2d at 871. It *sua sponte* denied access to the records in this litigation until the conclusion of proceedings on appeal and the return of the records to the circuit court clerk. 145 Mich. App. at 404, 377 N.W.2d at 871. In none of the prior proceedings had Dow, Consumers or Bechtel sought closure beyond the pretrial stage.

Petitioner filed an Application For Leave To Appeal the decision of the Michigan Court of Appeals in the Michigan Supreme Court. The court denied the Application in an Order entered April 28, 1986 and denied a Motion for Reconsideration in an Order entered July 28, 1986.[2]

REASONS FOR GRANTING THE WRIT

1. THE MICHIGAN COURTS IGNORED FIRST AMENDMENT REQUIREMENTS AS DETERMINED BY THIS COURT.

A. The Michigan Courts' Refusal To Set Aside Protective Orders That Suppress Trial Documents Until Exhaustion Of The Appeals Stage Violates This Court's Holding In *Seattle Times v. Rhinehart*

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), this Court extended First Amendment scrutiny to access to the civil pretrial arena. Rejecting a "compelling governmental

---

[2] Although both the Michigan Press Association and Midland Publishing Company were parties to this action and, with Booth, sought intervention in the state circuit court, filed the Complaint for Superintending Control in the Michigan Court of Appeals and applied to the Michigan Supreme Court for leave to appeal the decision of the Michigan Court of Appeals, neither of these parties joined in the Motion for Reconsideration in the Michigan Supreme Court, nor do they join in this Petition.

interest'' standard, the Court began its analysis of a civil protective order by considering whether the trial court's order furthered an important governmental interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms was no greater than necessary to protect the particular governmental interest involved. 467 U.S. at 32.

Although *Seattle Times* does not require the ''exacting'' First Amendment scrutiny of a prior restraint, 467 U.S. at 33, it nevertheless requires a First Amendment analysis when a protective order is challenged. As a constitutional minimum, the public and the press have a right to intervene and assert a challenge to closure.

The Michigan Court of Appeals denied petitioner access to all of the pretrial discovery documents subject to protective orders that were filed with the court and actually introduced into evidence in this case apparently on the basis that (1) historically, the public has not been entitled to such documents, 145 Mich. at 401-403; 377 N.W.2d. at 871; (2) if the public did have access to such documents, a litigant might be unable to have a fair trial, 145 Mich. at 403; 377 N.W.2d at 871; and (3) from an administrative point of view, the documents will usually not be easily accessible because of their location, 145 Mich. at 403-404; 377 N.W.2d at 871. This Michigan Court of Appeals decision, which the Michigan Supreme Court denied Booth leave to appeal, conflicts substantially with this Court's decision in *Seattle Times* as well as with the very recent decision in *Press-Enterprise Co. v. Superior Court*, 478 U.S. ____, 92 L.Ed. 2d 1 (1986) (*Press-Enterprise II*). *Press-Enterprise II* was not available, of course, at the time the Michigan Court of Appeals issued its opinion in 1985 nor at the time the Michigan Supreme Court entered its April 28, 1986 Order denying leave to appeal.

In *Seattle Times*, libel plaintiffs sought a protective order based on their highly protected constitutional right to engage in private religious activity. Initially, the trial Court denied plaintiffs' motion. The motion was later granted, based on affidavits

detailing attacks, threats and assaults. The trial court found that there was good cause to enter a protective order. In upholding the trial Court's findings, this Court held that, because the order was based on good cause shown on the record, it did not violate the First Amendment. 467 U.S. at 36.

The Court stated:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

467 U.S. at 37. The holding affirmed entry of the protective order, but did not, as the Michigan appeals court contended, negate all rights of access to pretrial documents. Rather, the Court established as a constitutional minimum that a party seeking closure of pretrial discovery must demonstrate that special reasons exist to justify closure. The protective order was allowed to stand because there had been a sufficient showing of good cause and because it was limited to pretrial discovery.

Importantly, the long-standing common law right of access recognized in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) and *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*."), was now recognized as being of constitutional status. While stating that the trial court must have substantial latitude to fashion protective orders, 467 U.S. at 36, this Court, in *Seattle Times*, has made clear that the constitution imposes strict limits on that latitude. As a minimum, a demonstration of good cause must be presented for supression of pretrial discovery documents. The logic of *Richmond Newspapers* and its progeny dictates that a higher and more restrictive standard be imposed upon a party seeking

closure once the trial commences. The instant controversy presents this Court with the opportunity to determine the specific standard to be applied by the trial court at the various stages of litigation. Whether it is determined that the standard should be more exacting at trial, it is certain that the constitutional minimum of good cause must be met.

The Court upheld the protective order in *Seattle Times* because "substantial government interests were implicated." 467 U.S. at 37 n. 24. In the instant case, no substantial government interest was demonstrated to or demanded by the trial judge. Each of the protective orders was entered without any consideration of whether or not good cause existed.

In right of access cases, this Court has demanded record justification for any restriction of access. In *Richmond Newspapers*, the Court found a violation of the First Amendment right of access when there was a total absence of any findings on the record to support the closure order. 448 U.S. at 584 (Stevens, J., concurring). Likewise, in *Globe*, the Court found the same constitutional infirmity in the order excluding the public from attending the testimony of minor victims in a sex-offense trial where the record indicated that the victims may have been willing to testify despite the presence of the press. 457 U.S. at 608–609. The order closing the *voir dire* proceedings and sealing the transcript in *Press-Enterprise I* was also overturned when the prolonged closure was unsupported by findings on the record, 464 U.S. at 510–511, 513, and the trial judge provided no explanation for his "broad order." 464 U.S. at 515 (Blackmun, J., concurring).

The constitutional right of access identified in *Seattle Times* was developed further by this Court in *Press-Enterprise II*. This Court concluded that the media had a First Amendment right of access to preliminary hearings in criminal cases as conducted in California and thus expanded First Amendment analysis of pretrial proceedings. In reaching this conclusion,

the Court analyzed two complementary factors which it had relied on in previous First Amendment right of access cases: (a) whether the place and process at issue has historically been opened to the press and general public and (b) whether public access plays a significant positive role in the functioning of the process of question. 478 U.S. at ____, 92 L.Ed.2d at 10.

In analyzing the first, or historical factor, the Court expanded the reach of First Amendment protection in cases decided after *Gannett*, where, in holding that the public had no Sixth Amendment right to insist upon access to a pretrial judicial proceeding in a criminal case, it had specifically relied on the premise that "there exists no persuasive evidence that at common law members of the public had any right to attend pretrial proceedings; indeed, there is substantial evidence to the contrary." 443 U.S. at 387. Thus, in *Press-Enterprise II*, reliance on historical experience was less substantial that it had been in previous access cases such as *Gannett*, *Richmond Newspapers*, *Globe* and *Press Enterprise I*. In *Gannett*, for example, in denying the right of access, this Court relied in part on the historical experience of states following the 1850 New York Field Code of Criminal Procedure which allowed closure of preliminary hearings at defendant's request. In *Press-Enterprise II*, however, this Court pointed out that even in those states such proceedings are presumptively open to the public, to be closed only for cause shown. 478 U.S. at ____, 92 L.Ed.2d at 12.[3] The departure from *Gannett* is evident.

The second factor that the Court considered was particularly decisive in *Press-Enterprise II*: whether public access to preliminary hearings as conducted in California "plays a particularly significant positive role in the actual functioning of

---

[3] The extent of the Court's departure from the historical factor is indicated in footnote 3, 478 U.S. at ____, 92 L.Ed.2d at 12, where the Court observes, "Other courts have noted that some pretrial proceedings have no historical counterpart, but, given the importance of the pretrial proceeding to the criminal trial, the traditional right of access should still apply."

the process." 478 U.S. at ____, 92 L.Ed.2d at 10. In *Richmond Newspapers*, *Globe*, and *Press-Enterprise I*, *supra*, the Court had already determined that public access to criminal trials and the process of selecting jurors enhanced the proper functioning of the criminal justice system.

In *Press-Enterprise II*, the Court noted that because of its extensive scope, a preliminary hearing is often the final and most important step in the criminal proceeding, and that in many cases, it provides the sole occasion for public observation of the criminal justice system. The absence of a jury, the Court stated, makes the importance of public access to a preliminary hearing even more significant. Quoting *Richmond Newspapers* 448 U.S. at 572 the Court said: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

In *Press-Enterprise II*, the Court also observed that closure of the hearing and sealing of the transcripts of the 41-day preliminary hearing would frustrate what the Court has characterized as the "community therapeutic value" of openness. *Richmond Newspapers*, 448 U.S. at 570. In assaying the benefits of access, the Court alluded to *Press-Enterprise I*, in which it had stated:

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

464 U.S. at 508.

The Court, having determined there is a positive function a qualified First Amendment right of access brings to preliminary hearings in California, held that the proceedings

cannot be closed unless specific, on-the-record findings are made demonstrating that "closure is essential to preserve higher values and is narrowly tailored to serve that interest." 478 U.S. at ____, 92 L.Ed 2d at 13.

In abandoning its opinion in *Gannett*, and in departing from the "historical factor" analysis it had utilized in *Richmond*, *Globe* and *Press-Enterprise I*, not only has the Court now found a public right of access to pretrial proceedings in a criminal case, but it has also altered the basic standard by which it determines whether the public has a right of access to a particular proceeding or process. By its overwhelming reliance on the "structural factor," that is, the positive role such access plays in the function of the process, and by its replacement of the historical context at the time the First Amendment was ratified with a general historic tradition unrelated to that time, the Court has, in effect, adopted the very reasoning which Justice Stewart, the author of the opinion, eschewed in *Gannett*. In that case, Justice Stewart observed that if reliance is not specifically placed on the historical intentions of the drafters of the Constitution, the right of access could be extended more freely.

> [Th]ere is no principled basis upon which a public right of access to judicial proceedings can be limited to criminal cases if the scope of the right is defined by the common law rather than the text and structure of the Constitution.
>
> Indeed, many of the advantages of public criminal trials are equally applicable in the civil trial context. While the operation of the judicial process in civil cases is often of interest only to the parties in the litigation, this is not always the case. . . . Thus, in some civil cases the public interest in access, and the salutary effect of publicity, may be as strong as, or stronger than, in most criminal cases.

443. U.S. at 386 n. 15.

The rationale and logic of *Press-Enterprise II*, along with the holding in *Seattle Times*, lead to the inescapable conclusion that there is a First Amendment right of access to civil proceedings. Indeed, a number of federal circuit courts have already determined such a right of access exists.[4]

The "structural factor" analysis adopted by *Press-Enterprise II* was predicated on the need to improve the public's understanding of the judicial process. Affording access to pretrial discovery is a significant step in heightening the public's appreciation of its courts. Most citizens' experience with the court system involves the civil rather than criminal courts. Common misconceptions and complaints about lawyers often stem from the lengthy and confusing pretrial process. Because so many cases are settled before they ever get to trial, the pretrial discovery phase of a case may be the sole occasion for public observation of the justice system. *Press-Enterprise II*, 478 U.S. at ____, 92 L.Ed. 2d at 12.

Just as it is difficult for people in an open society to accept what they are prohibited from observing in the criminal justice context, *Richmond Newspapers*, 448 U.S. at 572, so it is in the civil context when access to a major aspect of litigation — the discovery stage — or to documents and records used at trial is denied to the public. *Press Enterprise II*, 478 U.S. at ____, 92 L.Ed.2d at 12. The "community therapeutic value" of openness is as frustrated in the civil context as it is in the criminal, when access to pretrial discovery documents and trial documents is prohibited. That fact is particularly evident in this case, in which a quarter of a billion dollar nuclear plant became a four billion dollar gas plant and the documents which might have explained the debacle were all hidden from

---

[4] *See Publicker Industries v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984); *In re Continental Illinois Securities Litigation*, 732 F.2d. 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d. 1165, 1178-79. (6th Cir. 1983), *cert. denied* 465 U.S. 1100 (1984).

public view. The actions of the parties, as well as of the court, in this controversy of extraordinary public dimensions, warrant public scrutiny.

It is beyond serious question that the public policy argument in *Richmond Newspapers*, which the Court there applied to criminal trials, applies as strongly to civil trials and to documents used at such trials. Access to trial documents can only improve public understanding of the judicial process, while at the same time affirming the public's confidence in the judicial system. The right of access in the context of pretrial civil discovery matters reaps similar benefits.

> Access to pretrial documents furthers the same societal needs served by open trials and pretrial civil and criminal proceedings. Court officials can be better evaluated when their actions are seen by informed, rather than merely curious, spectators. An open courtroom demonstrates with certainty only that a judge is not sleeping, or drunk, or overtly racist, and that counsel is not appealing to prejudice. The availability of documents means that graft and ignorance will be more difficult to conceal. The argument in *Richmond Newspapers* that public understanding of the judicial process improves through the access right is necessarily strengthened the earlier in the process the right triggers and the more detail is available to public and press. Confidence in the judicial system as a whole is elevated by the ability of reporters and citizens to examine the early pleadings and discovery in a case, and to see from the beginning what issues are raised. Keeping the great majority of pretrial documents accessible assures the public that what is said in court truly reflects the questions at hand.

Note, *Access to Pretrial Documents Under the First Amendment*, 84 Colum. L. Rev. 1813, 1827 (1984). This public policy argument is especially notable here, where the appeals court denied access not only to pretrial documents but to trial

documents as well, where the right to access is arguably greater.

Openness serves as a check not only on the litigants, but on the court as well. When a court adopts a protective order, it lends certain force to what would otherwise be a private agreement, and that force includes the power to impose contempt. As the Sixth Circuit Court of Appeals stated in *Brown & Williamson Tobacco Corporation v. Federal Trade Commission*, 710 F.2d 1165, 1179 (6th Cir. 1983), "Without access to the proceedings, the public cannot analyze and critique the reasoning of the court . . . One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion." This public scrutiny was most necessary here, where the trial judge entered *ex parte* protective orders, held unannounced telephone conferences and cancelled a scheduled hearing when he saw that counsel for petitioner would attend.

Petitioner Booth Newspapers does not seek in this case a requirement that the trial court determine whether there is a "compelling interest" for entry of a protective order. This is the strictest test for exclusion, required for closure of a trial, where facts have traditionally been marshalled for public review. In the earlier phases of trial preparation, this Court has now required some level of First Amendment scrutiny which would afford the public access to elements of a governmental proceeding absent a substantial government interest to deprive it of that access. *Seattle Times*, 467 U.S. at 37 n. 24.

Accordingly, application of the standards set forth in *Press-Enterprise II* and *Seattle Times* to the circumstances in this case, demonstrates that petitioner has a First Amendment right of access to the pretrial and trial documents at issue here and that the Michigan courts clearly erred in not considering that right.

Relying on this Court's decision in *Gannett Co. v. DePasquale*, the Michigan Court of Appeals erroneously disregarded the

direction in which this Court has moved toward increased public access to important information and prohibition of arbitrary interference with that access. In the line of cases subsequent to *Gannett*, i.e., *Richmond Newspapers*, *Globe*, *Wailer v. Georgia*, 467 U.S. 39 (1984) and *Press-Enterprise II*, the Court has gone from a strict, definitional approach to the First Amendment right of access to a more substantive analysis.

In a quote from *Gannett*, for instance, on which the Michigan court based its holding, Chief Justice Burger stated, "For me, the essence of all this is that by definition 'pretrial proceedings' are exactly that." 145 Mich. App. at 401-402, 145 N.W. 2d at 870, quoting from 443 U.S. at 396-97 (Burger, C.J., concurring). Seven years later, the Chief Justice made a different observation in *Press-Enterprise II*:

> The California Supreme Court concluded that the First Amendment was not implicated because the proceeding was not a criminal trial, but a preliminary hearing. However, the First Amendment question cannot be resolved solely on the event, i.e., "trial" or otherwise, particularly where the preliminary hearing functions much like a full scale trial.

478 U.S. ____, 91 L.Ed.2d at 9.

In its opinion, the Michigan Court of Appeals not only refused to budge from the outdated definitional approach to courtroom access, but it also went a step further. The appeals court denied access to the discovery documents until conclusion of the proceedings on appeal.[5] There is no precedent for

---

[5] The unprecedented extension of the life of the protective orders until after appeal makes little sense when read with the appeals court's own statement that, "[t]he protective order issued in this case does not extend to matters which will be admitted at trial, thus plaintiffs are not denied their right to be present at trial or to report on all evidence admitted at that time." 145 Mich. App at 403, 377 N.W.2d at 871.

so radical a ruling. This determination could conceivably deny access to relevant documents for years, until long after the issues sought to be elucidated have lost their newsworthy qualities. In this case, the trial which began two years ago has been stayed indefinitely. According to the appeals court opinion, public access to the documents has likewise been stayed. This egregious result is without support in law or logic. The holding of this Court in *Seattle Times* proscribes such a result; rather, it mandates access, and not closure, as the general rule. Delaying tactics by the litigants and the status of the court docket should not determine whether the public can have access to newsworthy information.

Access must be determined according to a constitutional standard. This Court's opinions in *Seattle Times* and *Press-Enterprise II* support petitioner's First Amendment right to demand from the trial court that a determination of good cause, based on the existence of a substantial government interest, be made before the public and press can be denied access to pretrial discovery materials.

B. The Michigan Supreme Court Has Denied Review Of A Michigan Court Of Appeals Decision Denying Standing To Booth To Intervene And Object To Closure Despite United States Supreme Court Precedent.

Petitioner Booth sought intervention in the Consumers-Dow litigation to object to the blanket sealing of all depositions and other documents by the trial judge. In its opinion, the Michigan Court of Appeals found that

> "The trial court did not abuse its discretion in denying plaintiffs' intervention. GCR 1963, 209.1(3) requires an applicant for intervention to be bound by a judgment in the cause. We fail to see how plaintiffs will be affected in

any way by the outcome of the contract suit between defendants." 145 Mich. App. at 404, 377 N.W.2d at 872.

Similarly, in *Globe Newspaper Co. v. Superior Court*, the trial court refused Globe permission to file a motion to intervene in a criminal trial where the judge had ordered the courtroom closed during testimony of the minor victim. This Court, however, abrogated the trial court's refusal to grant Globe standing to intervene by holding that the decision whether to close the courtroom in such circumstances must be made on a case-by-case basis. For such a case-by-case approach to be meaningful, the Court observed, representatives of the press "must be given an opportunity to be heard on the question of their exclusion." 457 U.S. at 609 n. 25 [quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979)].

As noted in the discussion of *Seattle Times*, a First Amendment analysis is required when a protective order is challenged. To address this issue, the public and the press must be given the opportunity to present a challenge. The trial court and then the appeals court ignored petitioner's First Amendment right to intervene under any level of scrutiny. Citing *Seattle Times* for the proposition that pretrial depositions and other documents are not traditionally public components of a civil trial, 145 Mich. App. at 403, 377 N.W.2d at 870, the appeals court failed even to consider the case's implication of First Amendment concerns. In the one paragraph it devoted to the trial court's denial of standing to intervene, the appeals court cited only the Michigan court rule [GCR 1963, 209.1(3)] which requires an intervenor to be "bound by a judgment in the cause."[6] This narrow interpretation would

---

[6] Michigan General Court Rule 209 has been replaced by Michigan Court Rule 2.209 ("M.C.R 2.209") which is, in pertinent part, nearly identical with its federal counterpart (Fed. R. Civ. P. 24). M.C.R 2.209 no longer contains language requiring an applicant to be bound by a judgment in the action.

prevent the press from ever challenging any closure where it was not a party, even closure of a courtroom during trial. The appeals court's lack of analysis of the standing issue does not comport with this Court's position on standing to challenge orders which eliminate public scrutiny of the court system.[7]

Such unintelligent and non-reflective use of the court's power is what resulted in the instant case. Five protective orders were entered, placing a blanket of secrecy over a controversy that has had and will continue to have an enormous impact on residents of Michigan and the future of the nuclear industry. With respect to standing, neither the trial court nor the appeals court made any reference to the First Amendment. The facts vividly demonstrate that not only did the trial judge fail to consider the rights of the public, but he also entered at least one protective order deliberately to thwart those rights.

When agents of the government limit access to public documents, as the trial judge did here in sealing all documents filed with the court clerk, the press may act as "agent" of interested citizens in seeking disclosure. *See Richmond Newspapers v. Virginia*, 448 U.S. 555, 586 n. 2 (1980) (Brennan, J., concurring). In litigation which almost certainly would result in higher electric rates for thousands of Michigan citizens, the First Amendment mandates that petitioner have standing to contest entry of umbrella protective orders.

---

[7] The failure of the appeals court to address the standing issue properly is highlighted by a recent decision of a federal magistrate who, in a case involving the same parties and virtually identical facts, held a petitioner had a First Amendment right to intervene and challenge a protective order. *In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45 (E.D. Mich. 1985). The court said, "Without standing by outside parties to challenge such behavior, the administrative convenience of adopting stipulations of parties without rigorous review could result in unintelligent and non-reflective use of the court's power." 109 F.R.D. at 47.

2. ALTHOUGH THE DECISION OF THE MICHIGAN COURT OF APPEALS IS IN ACCORD WITH A DECISION OF THE DISTRICT OF COLUMBIA CIRCUIT COURT OF APPEALS, IT CONFLICTS WITH DECISIONS IN THE SIXTH AND SEVENTH CIRCUITS AND THIS COURT SHOULD RESOLVE THAT CONFLICT.

To the extent that the Michigan Court of Appeals denied access to documents sought before judgment, it is in accord with the Circuit Court of Appeals for the District of Columbia. *In re Reporters Committee For Freedom Of The Press*, 773 F.2d 1135 (D.C. Cir. 1985), involved the claim of reporters to a right of access to documents used in civil litigation in connection with summary judgment and trial proceedings. Over vigorous dissent, the Court held that the reporters had no First Amendment right of access to any of the documents until entry of the judgment. 773 F.2d at 1338–1339.

The decision of the Michigan Court of Appeals in this case and that of the District of Columbia Circuit Court of Appeals in *Reporters Committee* conflict with decisions of the Sixth Circuit Court of Appeals in *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) and the Seventh Circuit Court of Appeals in *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984), which, as the dissent in *Reporters Committee* pointed out, both found that the First Amendment provides a presumptive right of contemporaneous access to materials admitted into evidence in a civil proceeding. 773 F.2d at 1347.[8]

---

[8] The Michigan Court of Appeals decision is also in conflict with the highest state court in Louisiana. In *Plaquemines Parish v. Delta Development*, 472 So.2d 560 (La. 1985), the Louisiana Supreme Court determined that there is a First Amendment right of access to pretrial discovery documents in a civil case.

In *Brown & Williamson*, the Sixth Circuit extended the right of access, which the Supreme Court has confirmed applies to criminal cases, to civil cases. The Sixth Circuit also extended that right of access, not just to civil trials themselves, but to information contained in court documents and court records. 710 F.2d at 1177–1181. As the court stated, "Court records often provide important, sometimes the only, bases or explanation for a court's decision." 710 F.2d at 1177. The court found this right of access, in part, in the First Amendment. 710 F.2d at 1177, 1179.

In *Continental Illinois Securities Litigation*, the Seventh Circuit likewise extended the Supreme Court-established right of access to criminal trials to civil cases, finding that the policies supporting the one also support the other. The court relied upon the long-recognized presumption in favor of public access to judicial records. 732 F.2d at 1308. It further noted that the presumption of access normally involves a right of *contemporaneous* access. 732 F.2d at 1310. At issue was a Special Litigation Report compiled in connection with certain derivative actions pending in the federal district court and admitted into evidence in connection with a motion. The Seventh Circuit affirmed the order of the district court granting the press access to the report before judgment. 732 F.2d at 1304, 1316. It also found that the First Amendment guaranteed this public right of access. 732 F.2d at 1314.

In each of these cases, the opinions of the Sixth and Seventh Circuit Courts of Appeal conflict directly with the opinion of the District of Columbia Circuit Court of Appeal in *Reporters Committee* and the opinion of the Michigan Court of Appeals in this case.

These conflicts justify the grant of certiorari to review the order of the Michigan Supreme Court denying petitioner leave to appeal the decision of the Michigan Court of Appeals.

CONCLUSION

This petition for certiorari should be granted and, upon review, the decisions of the Michigan Supreme Court and Michigan Court of Appeals should be reversed.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
E. EDWARD HOOD
Counsel of Record
TERRENCE E. HAGGERTY
JOAN H. LOWENSTEIN
300 Federal Center Building
206 South Fifth Avenue
Ann Arbor, Michigan 48104
(313) 663-3366
Attorneys for Petitioner

October 24, 1986

APPENDIX A

BOOTH NEWSPAPERS, INC. v. MIDLAND CIRCUIT JUDGE

145 Mich. App. 396; 377 N.W.2d 868 (1985)

Before: Shepherd, P.J., and D.E. Holbrook, Jr. and M.F. Sapala,[1] JJ.

D.E. Holbrook, Jr., J. Plaintiffs, Booth Newspapers, Inc., Midland Publishing Company and the Michigan Press Association, seek an order of superintending control directing the Midland Circuit Court to grant their demand for intervention in a pending case between Dow Chemical Company and Consumers Power Company which will thereby permit plaintiffs full access to pretrial discovery information in the Dow-Consumers case.

The instant action arises out of litigation concerning the construction of the Midland Nuclear Plant. Dow, upset with the slow pace of construction, announced it was withdrawing from participation in the project and brought suit in Midland Circuit Court against Consumers for reimbursement of monies previously advanced. Consumers counterclaimed, alleging wrongful renunciation of the contract. That case is still pending. *Dow Chemical Co v. Consumers Power Co*, Midland County Circuit Court No. 83-002232-CK-D.

The general contractor, Bechtel Power Corporation, has released many documents to the parties, relying on protective orders of the trial court to keep such information confidential. Bechtel is not a party to the main suit but, in its participation in the discovery, has delivered about a half million pages of information to Dow and Consumers.

Following the trial court's refusal of plaintiffs' access to court-protected information, plaintiffs filed a complaint for

---

[1] Recorder's court judge, sitting on the Court of Appeals by assignment.

superintending control. This Court then issued a show cause order on September 21, 1984, directing Dow, Consumers and Bechtel to show cause why the relief requested in the complaint, i.e. an order directing the Midland Circuit Court to vacate the protective orders and to allow plaintiffs to intervene, should not be granted. Pursuant to such order, the instant case is presently before us for plenary consideration.

The issues before us for determination are: (1) whether plaintiffs have the right, either constitutionally or via common law, to access to the pre-trial discovery information that is now subjected to protective orders; (2) whether the trial court abused its discretion in the issuance of the protective orders; (3) whether the trial court erred in its denial of intervention by the plaintiffs; and (4) whether superintending control is the appropriate remedy for plaintiffs to seek in this case.

Our review of the record reveals that the documents plaintiffs seek to have released are in two different locations. Some of the documents are on file with the court, while other documents have merely been exchanged between the parties and have not yet been filed with the court and may never become a part of the court record. We find it necessary to separately discuss and analyze the propriety of the protective orders as they relate to the documents which have not been filed with the court and the propriety of the protective orders as they relate to documents which have been filed with the court.

I. Documents not a part of the court file.

We hold that plaintiffs lack standing as to these documents and dismiss the complaint for superintending control to the extent that it relates to such documents. Plaintiffs' claim of standing is predicated on its First Amendment right to gather information, and they allege that were it not for the protective orders, the parties would be free to disseminate the information. While this may be sufficient to constitute an injury in fact, we fail to find that plaintiffs' alleged injury can be fairly

traced to the action of the court or that it would likely be redressed by a favorable decision. *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co*, 748 F2d 1421 (CA 10, 1984).

Even if we were to lift the protective orders, it does not follow that plaintiffs can compel defendants to disseminate documents in their possession. The real parties in interest have not appealed from the imposition of the protective orders. In fact, such orders were imposed only after the real parties had agreed and stipulated to the terms and conditions of production of documents.

II. Documents on file with the court.

It is clear that the press does not have any special access to information not available to the public generally.[2] *Zemel v. Rusk*, 381 US 1, 16-17; 85 S Ct 1271; 14 L Ed 2d 179 (1965), and *Branzburg v. Hayes*, 408 US 665, 684; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Nor does the press have a greater right to gather information for the sake of news than does the general public. *Pell v. Procunier*, 417 US 817, 833-835; 94 S Ct 2800; 41 L Ed2d 495 (1974).

Plaintiffs cite *Seattle Times Co v. Rhinehart*, ____ US ____; 104 S Ct 2199; 81 L Ed 2d 17 (1984), for the proposition that a trial court may restrict public access to pretrial discovery materials not yet admitted into evidence only upon a showing of "good cause". See, GCR 1963, 306.2. Plaintiffs have interpreted *Rhinehart* too broadly. The issue in *Rhinehart* was "whether a *litigant's* freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used". 81 L Ed 2d 26 (emphasis supplied). In this case, we

---

[2] This point was acknowledged by counsel for the media plaintiffs at oral argument.

are concerned with the rights of the public, not those of the parties to the underlying litigation.

> "Moreover, pretrial depositions and interrogatories are not public components of a civil trial. * * * Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Rhinehart, 81 L Ed 2d 27.

Chief Justice Burger, concurring in *Gannett Co v. DePasquale*, 443 US 368, 396–397; 99 S Ct 2898; 61 L Ed 2d 608 (1979), said:

> "[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than *wholly private to the litigants*. A pretrial deposition does not become a part of a 'trial' until and unless the contents of the deposition are offered in evidence. * * *
>
> "For me, the essence of all of this is that by definition 'pretrial proceedings' are exactly that." (Emphasis supplied.) Quoted with approval in *Houston Chronicle Publishing Co v. Hardy*, 678 SW2d 495 (Tex App, 1984), *cert den* ____ US ____' 105 S Ct 1754; 84 L Ed 2d 817 (1985).

Additonally, "to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court". *Rhinehart*, 81 L Ed 2d 27, fn 19.

In *Nixon v. Warner Communications, Inc*, 435 US 589; 98 S Ct 1306; 55 L Ed 2d 570 (1978), the Court held that neither the First Amendment nor the Sixth Amendment guaranty of public trial required public access to tapes, even after the tapes were admitted as evidence at trial. See also, *In re Midland Pub-*

lishing Co, Inc, 113 Mich App 55; 317 NW2d 284 (1982), *aff'd*, 420 Mich 148; 362 NW 2d 580 (1984). In *Nixon*, the Court noted there had been no restriction on "any information in the public domain", since the press was permitted to listen to and was furnished transcripts of the tapes. 435 US 609. There was, therefore, "no question of a truncated flow of information to the public". *Id.* The Court emphatically rejected the claim that the First Amendment guarantees the right to copy and publish exhibits and other materials displayed in open court.[3]

Michigan has long held that the public is not entitled to access of courthouse records until after the trial has at least commenced in open court. *Park v. Detroit Free Press Co*, 72 Mich 560; 40 NW 731 (1888); *Schmedding v. Wayne County Clerk*, 85 Mich 1; 48 NW 201 (1891). The protective order issued in this case does not extend to matters which will be admitted at trial, thus plaintiffs are not denied their reight to be present at trial or to report on all evidence admitted at that time. *Estes v Texas*, 381 US 532, 541-542; 85 S Ct 1628; 14 L Ed 2d 543 (1965); and *Cox Broadcasting Corp v. Cohen*, 420 US 469, 492-493; 95 S Ct 1029; 43 L Ed 2d 328 (1975). At the conclusion of the proceedings, the records become public property and there is no longer any reason to withhold the information unless good cause is shown.

Under MCR 2.302(H) discovery materials are only required to be filed if they are to be used at trial or in connection with a motion or as an exhibit. Only those discovery materials will be considered a part of the record on appeal. Accordingly, even after the proceedings are concluded, any materials that contain a trade secret or other confidential research, MCR 2.302(C)(7), may still not be available for public perusal.

---

[3] As to the Sixth Amendment question the Court stated:

"The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed". 435 US 610.

While the litigation is pending, the media does not have an absolute right of access to the court file. Such pretrial publicity may result in a litigant's being unable to have a fair trial, *Houston Chronicle*, *supra*. Additionally, while a matter is before the court, whether it be the circuit court or an appellate court, the record will often be in the direct custody of a judge rather than on file in the clerk's office. To require the judge who has immediate control of the record to respond to demands for copies or inspection of the materials in the record could pose a substantial burden on the decisional process. As the Michigan Supreme Court indicated in *Schmedding*, *supra*, p 4, public access to the records of pending litigation could be denied until a "final determination" of the action was reached. We adopt this rule and extend it until the conclusion of proceedings on appeal, and the return of the record to the circuit court clerk. MCR 7.210(I).

Accordingly, during the pendency of the action the plaintiffs as well as the general public have access to the court file if it is in the possession of the court clerk, subject to the limitations discussed herein relating to protective orders. Plaintiffs have no right to any documents which were not filed with the court but were merely exchanged between the parties.

By this decision we do not place any restraints on the media to publish any information or document they acquire from any source. We have simply defined the extent to which the media and the general public have a right to obtain documents which have been either filed with the court or exchanged between the parties during the pendency of a case.

Further, we find that the trial court did not abuse its discretion in denying plaintiffs' intervention. GCR 1963, 209.1(3) requires an applicant for intervention to be bound by a judgment in the cause. We fail to see how plaintiffs will be affected in any way by the outcome of the contract suit between defendants.

Therefore, the complaint for superintending control is dismissed. Costs to defendants.

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

v

File No.
83-002232-CK-D

CONSUMERS POWER COMPANY,
Defendant.

OPINION OF MOTION FOR LEAVE TO INTERVENE

This matter comes before the court on the motions to intervene by Booth Newspapers, Inc., Midland Daily News Publishing Association and the Michigan Press Association. These parties wish to intervene for the sole purpose of challenging certain protective orders entered by the court in connection with the discovery proceedings which have been in progress for over a year. This motion comes a month and a half or so after the court first announced its intention to proceed to trial in this matter during the month of October. The assignment clerk has mailed notices for the trial for this case for October 1, 1984. Access to the depositions of various witnesses taken during discovery are sought by those seeking intervention. Although an order has been entered keeping these depositions sealed, they have not actually been treated any differently than depositions are normally treated in this circuit.[1] The court has had the benefit of written briefs from all parties interested in the motions.

---

[1]In this circuit for at least the last ten years, depositions received sealed in accordance with Rule 306.6 GCR have remained sealed until used pursuant to the provisions of Rule 302.4. Whether depositions involved in this matter could be used by the parties pursuant to the provisions of Rule

(footnotes continued on next page)

The right to intervene in a pending proceeding is governed by Rule 209 GCR. Rule 209 provides in pertinent part as follows:

Rule 209. Intervention.

.1 *Intervention of Right.* Anyone shall be permitted to intervene in an action

(1) when a statute of this state confers an unconditional right to intervene;

(2) by stipulation of all the parties; or

(3) upon timely application when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment in the action; or

(4) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or officer thereof.

.2 *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action

(1) when a statute of this state confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

(footnotes continued from previous page)

302.4(3) has not yet been determined. Prior to use in accordance with Rule 302.4, depositions have not been regarded as part of the record available even to the court itself. This is a non-jury matter and, obviously, it would be improper for the trier of fact to become familiar with the contents of these depositions before they have been admitted in evidence.

In all cases the court, in exercising its discretion, shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The committee responsible for the drafting of Michigan General Court Rules explains the effect of Rule 209 as follows:

"COMMITTEE COMMENT: * * * In effect, any one who has sufficient *interest* in the *subject matter of the action to be joined as a proper party* may, in the event that he has not been joined, assert his right by intervention * * * .

Intervention of Right. There may be persons having an interest so vital to the matter being litigated that they ought to have been made parties in the first place * * * .

Permissive Intervention. Other persons not so vitally *interested in the action* may yet be *interested enough* that their presence would promote convenience and prevent trial duplication." (Emphasis added)

It is clear that the *sine qua non* of intervention, either of right or permissive, is interest in the subject matter of the action. It is equally clear that intervention interest criteria must be addressed in the same manner as criteria for either necessary or permissive joinder as provided by Rules 205 and 206 MCR.

Necessary joinder requires such interest in the subject matter of an action that the party's presence in the action is essential to permit the court to render complete relief. (MCR 205.1)

Permissive joinder as a plaintiff requires assertion of rights to relief jointly, severally or in the alternative in regards to or arising out of the same transaction, occurrences or series of transactions or occurrences or the existence of questions of law or fact common to all parties in the action. Persons may be joined as defendants if there is asserted against them jointly, severally or in the alternative any right to relief in regards to or

arising out of the same transactions, occurrences or series of transactions or occurrences or if questions of law or fact common to all parties will arise in the action.

This action arises out of a contract to supply process steam dated June 21, 1978 under which Consumers agreed to supply process steam to Dow's Michigan division. This contract was terminated by the Dow Chemical Company on July 14, 1983. On that date, Dow brought this action seeking a declaratory judgment that all obligations of Dow to Consumers had been cancelled and discharged due to Consumers' wrongful conduct or, alternatively, that any termination payment under the general agreement be substantially reduced. Dow further sought a declaration that it is owed damages arising out of expenditures of over sixty million dollars ($60,000,000) in reliance on Consumers [sic] misrepresentation and non-disclosure. Consumers counterclaimed for a termination fee of four hundred and sixty million dollars ($460,000,000) in addition to money damages for bad faith breach of contract.

Those asserting the right to intervention claim no interest in the subject matter of the litigation or the relief sought by either of the parties. They seek access to information contained in the discovery depositions taken by the parties having an interest in the subject matter of the action and seeking relief. Any interest those seeking intervention assert are [sic] not in the claim or defenses of the main action, but in the discovery proceedings which the parties have been engaged in in preparation for the trial.

Although those seeking intervention are engaged in the business of selling information to their subscribers, they have no greater right of access to information claimed to be public than any other individual in this society. If the protective orders entered by the court prohibited the applicants from the publication of information concerning this litigation, applicants would stand on a different footing than the public

generally. None of the protective orders entered by the court contain any prohibition or restraint upon publication by the applicant. The names of all the witnesses whose depositions have been filed are available to the press or any other person having curiosity, either private or commercial. The names of witnesses whose depositions have not been taken, or if taken and not filed, are contained in notices which are a part of the file. Reporters are free to question these witnesses and publish whatever information they are able to obtain. Under these circumstances, to grant these applicants intervention for the purposes of access alone would require that intervention be granted not only in this case, but in any other case to any curious citizen.

Those attempting intervention insist that the parties' representation of applicants' interest may be inadequate.[2] It is clear that applicants have no interest in the subject matter of the case within the meaning of Rule 209.1(3). They have no interest in the relief to be obtained in the case, and cannot be bound by the judgment in this case. They express curiosity concerning the information which the parties have been able to collect in preparation for trial, but this is not an interest in the subject matter or relief within the meaning of Rule 209.1(3).

---

[2] An article in a newspaper published by one of those seeking intervention would lead one to believe that intervention was sought so that applicant might more effectively assert the claims of the plaintiff rather than the fear that plaintiff might not effectively assert claims of applicant. In this connection, it may be merely coincidental that plaintiff's counsel represents the applicant in another press access case. It might also be worthy of note that plaintiff's public relations director is a former editor of that publication.

"DeWitt issued the protective order at the request of Consumers after Dow asked to release information contained in the depositions. Dow attorneys said they are receiving inquiries from the media about how it will prove accusations made in its lawsuit against Consumers, and said it wants to answer those questions."

Midland Daily News, 7/30/84

The court finds that applicants are without interest in the subject matter of the action within the meaning of Rule 209 and, therefore, should not be permitted to intervene in these proceedings. The court does not reach, nor does it decide, the motion by Booth Newspapers, Inc. to vacate the court's protective orders. While the court finds that intervention by applicant is not proper under the circumstances, the interest of the applicants may be sufficient to support a writ for superintending control in the Court of Appeals. Applicant Midland Daily News Publishing Association has used this remedy in at least one other press access case, and the court would be happy to respond to a complaint for such a writ.

DAVID SCOTT DeWITT, CIRCUIT JUDGE

DATED: August 8, 1984

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

CONSUMERS POWER COMPANY,
Defendant.

Case No.
83 0002232 CK D

Hon.
David Scott DeWitt

PROTECTIVE ORDER

At a session of said Court, held in the City of Midland, County of Midland, State of Michigan, on October 20, 1983.

PRESENT: HON. DAVID SCOTT DeWITT
Midland County Circuit Judge

The parties hereto, having stipulated to the entry of this order;

NOW, THEREFORE, IT IS ORDERED as follows:

1. Any document produced by either party to this action (the "Producing Party") for inspection or copying by the other party (the "Discovering Party"), which is designated by the Producing Party as "Confidential", shall be used by the Discovering Party only for the purposes of this litigation and for no other purpose, except as otherwise permitted in this order. The Discovering Party shall not make such documents or the information contained therein available to any person, except:

(a) such employees, former employees and agents of the Discovering Party as are involved in the prosecution or defense of the claims and counterclaims in this action;

(b) attorneys engaged or employed by the Discovering Party and their supporting staffs;

(c) any expert witness, consultant or other person or firm engaged by the Discovering Party or its attorneys to assist in connection with this action;

(d) the United States Nuclear Regulatory Commission, the Michigan Public Service Commission or any other judicial, administrative or legislative body (each of which is hereafter referred to as a "Governmental Entity"), or to a party to a proceeding before such Governmental Entity, where such disclosure is made pursuant to:

(i) the compulsory process or order of such a Governmental Entity; or

(ii) the obligation of the Discovering Party to make such disclosure to such Governmental Entity or to a party to a proceeding before such a Governmental Entity.

Before making any disclosure under this subparagraph (d), the Discovering Party shall give ten (10) days' prior written notice to the Producing Party of its intent to do so, together with a description of the documents to be disclosed, so as to allow the Producing Party an opportunity to petition the Governmental Entity to whom, or pursuant to whose process, such disclosure is to be made, for such relief as it deems appropriate. The Discovering Party may make the disclosure described in its notice to the Producing Party, unless otherwise ordered by such Governmental Entity prior to expiration of the ten day period described above.

2. By stipulating to this order, neither party has waived its right to assert before any Governmental Entity that the documents which it has designated as "Confidential" shall be treated as such by such Governmental Entity or by any person who, pursuant to the process, procedures or disclosure requirements of such Governmental Entity, comes into possession of such documents or the information contained therein.

3. Nothing in paragraph 1 shall prevent the parties from using documents designated as "Confidential", or the information contained therein, in any proceeding in this action such as, but not limited to:

(a) discovery depositions;

(b) motions, briefs and pleadings;

(c) argument before the Court;

(d) trial or appeal.

4. The Producing Party may designate particular documents as "Confidential" only by stamping on each page of the document to be so designated the phrase "Confidential Pursuant to the Order of the Midland County Circuit Court." When so designated, the document may be used for all purposes described in paragraphs 1 and 3, except that any pleadings, briefs or other papers filed by the parties in this action which quote, refer to or attach the "Confidential" document shall be filed with this Court in a sealed envelope with the following text on the outside:

> "This envelope contains confidential material filed under seal subject to the provisions of a Protective Order entered by this Court on October 20, 1983. This envelope may not be opened except by the Judge to whom this case is assigned, unless otherwise ordered by this Court."

5. The Clerk of this Court shall maintain all pleadings filed pursuant to the provisions of paragraph 4 in such a manner as to preserve their confidentiality and to prevent disclosure except as permitted in this order.

6. The Producing Party may designate a document as "Confidential" only if it contains Trade Secrets. As used herein, a "Trade Secret" consists of any formula, pattern, device or compilation of information (including a business

plan or forecast, a financial plan or forecast, a method, technique or process) that:

(a) is used in one's business and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it; and

(b) has been the subject of efforts by the Producing Party that are reasonable under the circumstances to maintain its secrecy; and

(c) has not previously been publicly disclosed.

The Discovering Party may, by notice in writing to the Producing Party, challenge such designation and, failing agreement between the Discovering Party and the Producing Party as to the appropriateness of such designation, either party may present the matter to this Court for determination.

7. Nothing in this order shall prevent the Discovering Party from disclosing any document designated as "Confidential" by the Producing Party or the information contained therein, free of the restrictions of this order, if such document or information:

(a) is or becomes a matter of public record (except by violation of this order); or

(b) has come into the possession of the Discovering Party from sources other than through discovery taken of the Producing Party in this action.

8. Any portion of a transcript of a deposition taken in this action (including exhibits attached thereto) of an individual, which is designated by either party as "Confidential", as defined herein, shall be subject to all of the provisions of this order dealing with the production of documents.

9. Before making any documents designated as "Confidential" or the information contained therein available to any person described in paragraph 1(c), the Discovering Party shall obtain from that person a written acknowledgment that he has been given a copy of this order, has read it and agrees to be bound by all of its terms.

10. At the conclusion of this litigation, all documents, including copies, designated by either party as "Confidential" and in the possession of the Discovering Party or any other person to whom such documents were made available by the Discovering Party pursuant to paragraph 1(a–c) of this order (except such documents as were also made available by the Discovering Party pursuant to paragraph 1(d) of this order or were publicly disclosed otherwise than by action of the Discovering Party), shall be returned to the Producing Party unless such parties reach agreement on other arrangements for the disposition of such documents.

11. This order shall be modified upon written stipulation of the parties and may be modified upon motion of either party, for good cause shown.

DAVID SCOTT DEWITT
Midland County Circuit Judge

We hereby stipulate to the entry of this order:

LAW OFFICES OF
HERBERT H. EDWARDS, P.C.

By: _____
Herbert H. Edwards

BARRIS, SOTT, DENN & DRIKER

By: _____
Eugene Driker (P-12959)
Attorneys for Consumers Power Company

KIRKLAND & ELLIS

By: _____
Attorneys for The Dow Chemical Company

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

CONSUMERS POWER COMPANY,
Defendant.

Case No.
83-002232-CK-D

Honorable
David Scott DeWitt

PROTECTIVE ORDER AS TO DOCUMENTS PRODUCED BY NON-PARTIES

At a session of said Court, held in the City of Midland, County of Midland, State of Michigan on December 2, 1983.

PRESENT: Hon. David Scott DeWitt
Midland County Circuit Judge

This matter, coming on to be heard on the motion of The Dow Chemical Company for a protective order, notice having been given and the Court being duly advised in its premises; NOW, THEREFORE, IT IS ORDERED as follows:

1. Any document produced by a non-party pursuant to subpoena, which is designated by the non-party as "Confidential" shall be used by the parties only for the purposes of this litigation and for no other purpose, except as otherwise permitted in this order. The parties shall not make such

documents or the information contained therein available to any person, except:

(a) such employees, former employees and agents of the parties as are involved in the prosecution or defense of the claims and counterclaims in this action;

(b) attorneys engaged or employed by the parties and their supporting staffs;

(c) any expert witness, consultant or other person or firm engaged by the parties or their attorneys to assist in connection with this action;

(d) the United States Nuclear Regulatory Commission or any other judicial, administrative or legislative body (each of which is hereafter referred to as a "Governmental Entity"), or to a party to a proceeding before such Governmental Entity, where such disclosure is made pursuant to:

(i) the compulsory process or order of such a Governmental Entity; or

(ii) the obligation of the party to make such disclosure to such Governmental Entity or to a party to a proceeding before such a Governmental Entity.

Before making any disclosure under this subparagraph (d), the party intending to make such disclosure shall give ten (10) days' prior written notice to the non-party of its intent to do so, together with a description of the documents to be disclosed, so as to allow the non-party an opportunity to petition the Governmental Entity to whom, or pursuant to whose process, such disclosure is to be made, for such relief as it deems appropriate. The party shall not make the disclosure described in its notice prior to expiration of the ten day period described above.

2. The non-party may assert before any Governmental Entity that the documents which it has designated as

"Confidential" shall be treated as such by such Governmental Entity or by any person who pursuant to the process, procedures or disclosure requirements of such Governmental Entity, comes into possession of such documents or the information contained therein.

3. Nothing in paragraph 1 shall prevent the parties from using documents designated as "Confidential", or the information contained therein, in any proceeding in this action such as, but not limited to:

(a) discovery depositions

(b) motions, briefs and pleadings

(c) argument before the Court;

(d) trial or appeal.

4. The non-party may designate particular documents as "Confidential" only by stamping on each page of the document to be so designated the phrase "Confidential Pursuant to the Order of the Midland County Circuit Court." When so designated, the document may be used for all purposes described in paragraphs 1 and 3, except that any pleadings, briefs or other papers filed by the parties in this action which quote, refer to or attach the "Confidential" document shall be filed with this Court in a sealed envelope with the following text on the outside:

> "This envelope contains confidential material filed under seal subject to the provisions of a Protective Order entered by this Court on October 20, 1983. This envelope may not be opened except by the Judge to whom this case is assigned, unless otherwise ordered by this Court."

5. The Clerk of this Court shall maintain all pleadings filed pursuant to the provisions of paragraph 4 in such a manner as to preserve their confidentiality and to prevent disclosure except as permitted in this order.

6. A document may be designated as "Confidential" only if it contains Trade Secrets. As used herein, a "Trade Secret" consists of any formula, pattern, device or compilation of information (including a business plan or forecast, a financial plan or forecast, a method, technique or process) that:

(a) is used in one's business and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it; and

(b) has been the subject of efforts by the non-party that are reasonable under the circumstances to maintain its secrecy; and

(c) has not previously been publicly disclosed. Either of the parties to this litigation may, by notice in writing to the non-party, challenge such designation and, failing agreement between the party giving notice and the non-party as to the appropriateness of such designation, either party may present the matter to this Court for determination.

7. Nothing in this order shall prevent the parties to this litigation from disclosing any document designated as "Confidential" by the non-party or the information contained therein, free of the restrictions of this order, if such documents or information:

(a) is or becomes a matter of public record (except by violation of this order); or

(b) has come into the possession of either of the parties from sources other than through discovery taken of the non-party in this action.

8. Any portion of a transcript of a deposition taken in this action (including exhibits attached thereto) of an individual, which is designated by a party or non-party as "Confidential", as defined herein, shall be subject to all of the provisions of this order dealing with the production of documents.

9. Before making any documents designated as "Confidential" or the information contained therein available to any person described in paragraph 1(c), the party intending to do so shall obtain from that person a written acknowledgement that he has been given a copy of this order, has read it and agrees to be bound by all of its terms.

10. At the conclusion of this litigation, all documents, including copies, designated by either party as "Confidential" and in the possession of the parties or any other person to whom such documents were made available by the parties pursuant to paragraph 1(a–c) of this order (except such documents as were also made available pursuant to paragraph 1(d) of this order or were publicly disclosed otherwise than by action of the parties) shall be returned to the non-party unless agreement is reached on other arrangements for the disposition of such documents.

11. Any non-party that is served with a subpoena to produce documents for this litigation shall have the right to apply to the Court, prior to the return date of the subpoena and upon reasonable notice to the parties, for an order further restricting the disclosure of confidential material.

DAVID SCOTT DeWITT
Midland County Circuit Judge

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

CONSUMERS POWER COMPANY,
Defendant.

Case No.
83-002232-CK-D

Honorable
David Scott DeWitt

PROTECTIVE ORDER AS TO DOCUMENTS PRODUCED BY BECHTEL

At a session of said Court, held in the City of Midland, County of Midland, State of Michigan, on April 6, 1984.

Present: Honorable David Scott DeWitt
Midland County Circuit Judge

The parties hereto, and Bechtel Power Corporation and Bechtel Associates Professional Corporation ("Bechtel"), having stipulated to the entry of this order:

NOW, THEREFORE, IT IS ORDERED as follows:

1. Any document produced by Bechtel, or by any consultant or subcontractor to Bechtel, which is designated by Bechtel as "Bechtel Confidential", shall be used by the parties only for the purpose of this litigation and for no other purpose. The parties shall not make such documents or the information contained therein available to any person, except:

(a) attorneys and their supporting staff, engaged or employed by the parties in 'the prosecution or defense of the claims and counterclaims in this action;

(b) such employees of the parties as are involved in the prosecution of the claims and counterclaims in this action;

(c) such former employees of the parties as are involved in the prosecution or defense of the claims and counterclaims in this action;

(d) named testimonial experts of the parties as are involved in the prosecution or defense of the claims and counterclaims in this action;

(e) non-testimonial consultants of the parties as are involved in the prosecution or defense of the claims and counterclaims in this action;

(f) the United States Nuclear Regulatory Commission, the Michigan Public Service Commission or any other judicial, administrative or legislative body (each of which is hereinafter referred to as a "Governmental Entity"), or to a party to a proceeding before such Governmental Entity, where such disclosure is made pursuant to:

(i) the compulsory process or order of such a Governmental Entity; or

(ii) the obligation of a party to make such disclosure to such Governmental Entity or to a party to a proceeding before such a Governmental Entity.

All Bechtel documents that are produced to the parties for review shall be "Bechtel Confidential" documents covered by this Order until such time as copies thereof are delivered by Bechtel to one or more of the parties without a designation required by paragraph 7. Upon such delivery, only documents bearing the designation required by paragraph 7 shall continue to be "Bechtel Confidential" pursuant to the terms of this Order.

2. At least 21 days prior to the date of any proposed disclosure of a "Bechtel Confidential" document to any

former employee or named testimonial expert under subparagraphs 1(c) or (d), the party proposing to make such disclosure shall notify counsel for Bechtel of the identity of such person.

3. At least 21 days prior to the date of any proposed disclosure to any non-testimonial consultant under subparagraph 1(e), the party proposing to make such disclosure shall provide to counsel for Bechtel a master list of potential consultants that includes the consultant to whom such disclosure is proposed to be made. This master list shall include the name, address and area of expertise of not more than thirty (30) consultants and shall be treated as confidential by Bechtel and its counsel. Neither the list nor any information contained on the list shall be disclosed by counsel for Bechtel except to Bechtel employees for the limited purpose of complying with paragraph 4, except such names or information which came into the possession of Bechtel or Bechtel's counsel from sources other than the party supplying the list.

4. Prior to the expiration of the 21-day period referred to in paragraph [sic] 2 and 3, Bechtel may object to the disclosure of a "Bechtel Confidential" document or documents to any named former employee, testimonial expert or non-testimonial consultant by notifying the counsel for the party proposing disclosure of the identity of each former employee, expert or consultant to which an objection is made, the basis of the objection, and the documents or specific categories of documents to which such objection applies. Counsel for Bechtel and the party proposing disclosure shall attempt to resolve their objections by agreement. In the event counsel for Bechtel and the party proposing to make the disclosure are unable to agree as to whether disclosure may be made to the named former employee, testimonial expert or a non-testimonial consultant, counsel shall notify the Court for the purpose of arranging a conference in chambers to determine how the dispute should be

resolved. If Bechtel has objected to the disclosure of a document or documents to any named former employee, testimonial expert or non-testimonial consultant, no such disclosure shall be made pending resolution of Bechtel's objections under this procedure.

5. Before making any disclosure to any Governmental Entity under subparagraph 1(f), the party intending to make such disclosure shall give ten days' prior written notice to Bechtel of its intent to do so, together with a description of the documents to be disclosed, so as to allow Bechtel an opportunity to petition the Governmental Entity to whom, or pursuant to whose process, such disclosure is to be made, for such relief as it deems appropriate. Prior to expiration of the ten day period described above, the party shall not make the discloure described in its notice to Bechtel. By stipulating to this order, Bechtel has not waived its right to assert before any Governmental Entity that the documents which it has designated as "Bechtel Confidential" shall be treated as such by such Governmental Entity or by any person who, pursuant to the process, procedures or disclosure requirements of such Governmental Entity, comes into possession of such documents or the information contained therein.

6. Nothing in paragraph 1 shall prevent the parties from using documents designated as "Bechtel Confidential", or the information contained therein, in any proceeding in this action such as, but not limited to:

(a) depositions;

(b) motions, briefs and pleadings;

(c) argument before the Court;

(d) trial or appeal.

7. Bechtel may designate particular documents as "Bechtel Confidential" only by stamping or otherwise affixing on each page of the document to be so designated the phrase "Bechtel

Confidential Pursuant to the Order of the Midland County Circuit Court." Bechtel shall designate documents as "Bechtel Confidential" prior to providing copies of them to Consumers or Dow. When so designated, the document may be used only for the purposes described in paragraphs 1 and 6. Any pleadings, briefs, deposition transcripts or other papers filed in this action by the parties, any court reporter, Bechtel or any other person which quote, refer to or attach a "Bechtel Confidential" document shall be filed with this Court in a sealed envelope with the following text on the outside:

> "This envelope contains confidential material filed under seal subject to the provisions of a Protective Order entered by this Court. This envelope may not be opened except by the Judge to whom this case is assigned, unless otherwise ordered by this Court."

8. The Clerk of this Court shall maintain all pleadings filed pursuant to the provisions of paragraph 7 in such a manner as to preserve their confidentiality and to prevent disclosure except as permitted in this Order.

9. Bechtel may designate a document as "Bechtel Confidential" only if it contains:

> (a) Trade Secrets. As used herein, a "Trade Secret" consists of any formula, pattern, device or compilation of information (including a business plan or forecast, a financial plan or forecast, a method, technique or process) that:
>
> (i) is used in one's business and which gives the business an opportunity to obtain an advantage over competition who do not know or use it; and
>
> (ii) has been the subject of efforts by Bechtel that are reasonable under the circumstances to maintain its secrecy; and
>
> (iii) has not previously been publicly disclosed; or

(b) Competitively-sensitive commercial or financial information which, if disclos !, might prejudice the business of Bechtel or its clients; however, a document may not be designated "Bechtel Confidential" solely because it contains information adverse to the legal interest or position of either party in this litigation.

Either of the parties to this litigation may, by notice in writing to Bechtel, challenge such designation and, failing agreement between the party giving such notice and Bechtel as to the appropriateness of such designation, either party may present the matter to this Court for determination.

10. Nothing in this order shall prevent the parties to this litigation from disclosing any document designated as "Bechtel Confidential" or the information contained therein, free of the restrictions of this Order, if such document or information:

(a) is or becomes a matter of public record except by violation of this Order or a similar order in another case; or

(b) has come into the possession of either of the parties from sources other than Bechtel, except by violation of this Order or a similar order in another case.

11. (a) Each party to this action shall serve on Bechtel counsel a copy of each notice of deposition it files in the case. Within ten days of receipt of a notice, counsel for Bechtel shall notify the parties of any deponent who is not a Bechtel employee or consultant where Bechtel objects to the deponent's being shown "Bechtel Confidential" documents. For each deponent so identified by Bechtel, the parties shall notify Bechtel of each "Bechtel Confidential" document they plan to use in said individual's deposition five days before such deposition. Bechtel shall treat these lists as confidential and shall not disclose the lists or any information contained therein to any other party.

(b) At the commencement of a deposition of any Bechtel employee or consultant taken in this action, counsel for

Bechtel may designate the entire deposition and deposition transcript as "confidential." When so designated, the testimony and transcript will be subject to the provisions of this Order as if they were "Bechtel Confidential", provided, however, that within fifteen (15) days after receipt of any volume of the transcript, counsel for Bechtel shall have the right to and shall designate all pages of that volume which it deems to be "Bechtel Confidential" and shall notify the parties and the reporter in writing of the pages so designated. Pages of a transcript designated as "Bechtel Confidential" will be subject to the provisions of this Order as if they were produced by Bechtel; all pages not so designated, other than testimony designated as confidential during the taking of the deposition, shall not thereafter be confidential.

(c) Any deposition involving examination or use of a "Bechtel Confidential" document is subject to the provisions of this Order and neither such testimony nor transcript, or applicable portions thereof, may be disclosed except in accordance with this Order. If filed, the entire transcript is to be filed by the reporter in accordance with the provisions of paragraph 15. However, in the event that a copy of the transcript is forwarded to Bechtel's counsel, counsel for Bechtel shall, within fifteen (15) days after receipt of the transcript, have the right to and shall designate all pages of that transcript which it deems to be "Bechtel Confidential" in accordance with and pursuant to the same terms and provisions of subparagraph (b) of this paragraph. Pages of a transcript designated as "Bechtel Confidential" will be subject to the provisions of this Order as if they were produced by Bechtel; all pages not so designated, other than testimoney designated as confidential during the taking of the deposition, shall not thereafter be confidential.

12. Before making any Bechtel documents designated as "Bechtel Confidential" or the information contained therein available to any person, the party intending to do so shall obtain from that person a written acknowledgement in the form

of Attachment A that he or she has been given a copy of this Order, has read it and agrees to be bound by all of its terms.

13. On the last day of each month, each party shall submit to the Court under seal a list containing names of each person to whom disclosure of "Bechtel Confidential" documents has been made under the provisions of subparagraph 1(c), 1(d) and 1(e) of this Order during that month. The list shall also set forth for each person listed the identification numbers of "Bechtel Confidential" documents disclosed to each such person. In the event of a breach of the secrecy provisions of this Protective Order, the Court, upon the motion of Bechtel, may open the sealed envelopes in which the lists are contained and may make its own determination as to the circumstances of the breach, may order the parties to make such a investigation, may permit disclosure of the lists to Bechtel to the extent necessary to permit Bechtel to make an investigation and may enter such other order as may be appropriate under the circumstances.

14. Within thirty (30) days after the final settlement or conclusion of this case, the attorneys for Consumers and Dow shall return to Bechtel all "Bechtel Confidential" documents and material in their possession or in the possession of any person to whom such documents or information is disclosed, including all copies thereof, except for copies of such "Bechtel Confidential" documents or material which were furnished to a governmental entity by a party pursuant to subparagraph 1(f) of this Order. The issue of disposition of notes, tapes, other papers, and any other medium containing, summarizing, excerpting, or otherwise embodying any such material or its contents is reserved. The provisions of this Protective Order relating to the confidentiality to be accorded to "Bechtel Confidential" documents, material and the information contained therein shall continue to be binding upon the parties hereto, their counsel and any individual who has gained

access to such information in accordance with the terms of this Order after the final settlement or conclusion of this case.

15. The reporter of any deposition in this action shall:

(a) be served with a copy of this Order;

(b) acknowledge on the record receipt of the Order; and

(c) undertake that the reporter and the reporter's employees or agents shall be bound by the terms of the Order, and will make no use or disclosure of confidential information designated in the deposition unless otherwise ordered by the Court or permitted by the express consent of Bechtel. Those portions of the original transcript of any deposition and any deposition exhibits which are designated as containing confidential information, shall be sealed and delivered to the Clerk of the Court for filing and shall remain sealed until further order of the Court. The reporter shall mark the sealed envelope as set forth in paragraph 7. The reporter shall provide copies of the entire deposition transcript only to attorneys of record for the parties.

16. Violation of this Order may subject the Dow Chemical Company, Consumers Power Company, their respective counsel, and the persons subject to this Order to the contempt order of this Court and all sanctions permitted by the Michigan General Court Rules.

17. This Order may be modified upon written stipulation of the parties and Bechtel, and by order of this Court upon motion of either party or Bechtel, for good cause shown, provided reasonable notice of said motion is given to Bechtel.

18. Bechtel shall have the right to apply to the Court, upon reasonable notice to the parties, for an order further restricting the disclosure of confidential material.

19. This Order supercedes [sic] the Interim Protective Order dated November 9, 1983; however, nothing in this Order absolves any person of any violation of the Interim Protective Order committed between November 9, 1983 and this date.

_____

DAVID SCOTT DeWITT
Midland County Circuit Judge

We hereby stipulate to
the entry of this order:

LAW OFFICES OF
HERBERT H. EDWARDS, P.C.

By: _____
Herbert H. Edwards (P13112)

BARRIS, SOTT, DENN & DRIKER

By: _____
Eugene Driker (P12959)
Attorneys for Consumers Power Company

KIRKLAND & ELLIS

By: _____
Lawrence E. Strickling
Attorneys for The Dow Chemical Company

CLARK, KLEIN & BEAUMONT

By: _____
Lawrence M. Scoville, Jr. (P20168)
Attorneys for Bechtel Power Corporation and Bechtel Associates Professional Corporation

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

-vs-

CONSUMERS POWER COMPANY,
Defendant.

Case No.
83-002232-CK-D

Hon.
David Scott DeWitt

ORDER CONCERNING DEPOSITION TRANSCRIPTS

At a session of said Court, held in the City of Midland, County of Midland, State of Michigan, on July 17, 1984.

PRESENT: Hon. David Scott DeWitt
Midland County Circuit Judge

Upon motion of Consumers Power Company and for the reasons previously stated by the Court at the pre-trial proceedings,

IT IS HEREBY ORDERED that each transcript of deposition taken in this case which is filed with the Clerk of the Court shall be placed in a sealed envelope and shall not be opened until the further order of this court.

DAVID SCOTT DeWITT
Midland County Circuit Judge

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

CONSUMERS POWER COMPANY,
Defendant.

Case No.
83 002232-CK-D

Hon.
David Scott DeWitt

ORDER CONCERNING THE USE OF DISCOVERY MATERIALS

At a session of said Court held in the Midland County Courthouse, Midland, Michigan on August 31st, 1984

PRESENT: Honorable David Scott DeWitt
Midland County Circuit Judge

Pursuant to the previous bench rulings of this Court.

IT IS HEREBY ORDERED that information received by either party from the other party or from third parties through the discovery procedures of this Court, to the extent not properly made a part of the public record (including, but not limited to, transcripts of depositions, documents produced pursuant to court order, agreement or subpoena, and the videotapes of the Midland nuclear plant taken by the Dow Chemical Company), shall be used by the party receiving such information and its counsel solely for the preparation of the trial of this action, and for no other purpose, except that Consumers Power Company may disclose such discovery information to the United States Nuclear Regulatory Commission pursuant to its statutory obligation to do so.

DAVID SCOTT DeWITT
Midland County Circuit Judge

APPENDIX H

Michigan General Court Rule 307.4

Orders for the Protection of Parties and Deponents. After the service of interrogatories and prior to the taking of the testimony of the deponent, tne court in which an action is pending or the court in the county where the deposition is being taken, on motion promptly made by a party or deponent, upon notice and good cause shown, may make any order of the type specified in Rule 306 which is appropriate and just or an order that the deposition shall not be taken before the person designated in the notice or that it shall not be taken except upon oral examination.

APPENDIX I

Michigan General Court Rule 309.5

Orders for the Protection of Parties. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of subrule 306.2 are applicable for the protection of the party from whom answers to interrogatories are sought under Rule 309.

APPENDIX J

Michigan General Court Rule 310.1

Power of Court. After commencement of an action the judge of the court in which the action is pending may, upon motion of any party and upon notice to all other parties, and subject to the provisions of sub-rule 306.2:

(1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any reasonably designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, relevent to the subject matter involved in the pending action and which are in his possession, custody, or control; or

(2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, testing, sampling, or photographing the property or any designated object or operation thereon which is relevant to the subject matter involved in the pending action; or

(3) direct a person on whom a subpoena duces tecum has been served, to permit the inspection and copying or photographing of such books, papers, documents or tangible things subpoenaed.

(4) Notwithstanding the provisions of sub-rule 306.2, a party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph an application for insurance shall not be treated as part of an insurance agreement.

APPENDIX K

Michigan General Court Rule 209

209. Intervention.

.1 *Intervention of Right.* Anyone shall be permitted to intervene in an action

(1) when a statute of this state or a court rule confers an unconditional right to intervene; or

(2) by stipulation of all the parties; or

(3) upon timely application when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant may be bound by a judgment in the action; or

(4) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or officer thereof.

.2 *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action

(1) when a statute of this state confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common.

In all cases the court, in exercising its discretion, shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

.3 *Procedure.* When an application for intervention is required a person shall apply to the court by motion to intervene and shall give notice in writing to all parties. The motion shall state the grounds for intervention and shall be accompanied

by a pleading setting forth the claim or defense for which intervention is sought. When the validity of a statute of this state or a rule or regulation included in the Administrative Code of this state is drawn in question in any action to which the state or an officer or agency thereof is not a party, the court may require notice be given the Attorney General, specifying the pertinent statute, rule, or regulation.

No. 86-679

In the Supreme Court of the United States

OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.,
Petitioner,

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION OF RESPONDENTS BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION

CLARK, KLEIN & BEAUMONT
Laurence M. Scoville, Jr.
Counsel of Record
J. Walker Henry
Mark L. McAlpine
Lenora P. Ledwon
1600 First Federal Building
Detroit, Michigan 48226
(313) 965-8300

Counsel for Respondents Bechtel Power Corporation and Bechtel Associates Professional Corporation

RENAISSANCE PRINTING, INC., 1133 GRISWOLD
DETROIT, MICHIGAN 48226 (313) 964-3185

COUNTER-STATEMENT OF QUESTION PRESENTED

Does Petitioner have a right of access to private non-adjudicative pretrial discovery materials produced by a non-party to complex civil litigation in reliance upon a protective order entered pursuant to the trial court's discretion to prevent the abuse that can attend discovery practice?

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS OF THESE RESPONDENTS

Bechtel Power Corporation is a wholly-owned subsidiary of Bechtel Group, Inc., a privately-held corporation. Bechtel Associates Professional Corporation is a privately-held corporation affiliated with Bechtel Power Corporation.

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES PAGE

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

No. 86-679

In the Supreme Court of the United States

OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.,
Petitioner,

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF IN OPPOSITION OF RESPONDENTS BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION

Respondents, Bechtel Power Corporation and Bechtel Associates Professional Corporation (hereinafter "Bechtel" and "Respondents"), responding in opposition to Booth Newspapers, Inc.'s Petition for Writ of Certiorari, respectfully request that this Court decline review of the decision of the Michigan Court of Appeals, reported at 145 Mich. App. 396, 377 N.W.2d 868 (1985). The Michigan Supreme Court's declination of review is reported at 425 Mich. 854 (1986).

COUNTER-STATEMENT OF THE CASE

Petitioner, Booth Newspapers, Inc., seeks private, non-adjudicative materials produced under broad and liberal discovery rules for the purpose of publishing that information for commercial gain. While admitting that it has no greater rights of access to the judicial process than the public (Petition at A-3), Petitioner seeks direct access to those fruits of civil discovery not used in the adjudicative process as though it were a real party in interest in the underlying litigation.

Petitioner's objectives led it to seek intervention in a lawsuit involving the construction of a commercial power plant — the Midland Nuclear Power Plant ("Midland Project"). That lawsuit, *The Dow Chemical Company v. Consumers Power Company*, No. 83-002232-CK-D (Midland County Circuit Court filed July 18, 1983),[1] involves a contractual dispute between Consumers Power Company ("Consumers"), the owner of the project, and The Dow Chemical Company ("Dow"), one of the prospective commercial users of the plant. Bechtel was the designer/constructor of the Midland Project and is not a party to the underlying lawsuit (Petition at A-1). The Midland Project involves state-of-the-art technology and sophisticated design and construction techniques unique to nuclear power plants.[2] The millions of pages of materials generated in

---

[1] Dow and Consumers have reached agreement in principle which, if culminated, will result in settlement and dismissal of the litigation. The trial has been indefinitely recessed to allow for finalization of that settlement.

[2] The nature of the Midland Project and Bechtel's involvement in that project were described in affidavits filed with the trial court in connection with Bechtel's demonstration of good cause for protective orders governing the use of materials it produced to the parties.

connection with this project by Bechtel contain proprietary commercial information which, if placed in the hands of Bechtel's competitors, would jeopardize its competitiveness in the nuclear power industry.[3]

Shortly after the suit between Dow and Consumers began, Bechtel was served with a subpoena by Dow for the production of its documents. When advised of Bechtel's estimate that the subpoena called for the production of approximately 100 million pages, Dow agreed to a narrower subpoena. Bechtel also informed the parties that it had substantial concerns regarding distribution of its materials and, in particular, a concern that without a protective order, its materials would come into the possession of Bechtel's competitors and others who would be able to use the information to Bechtel's substantial detriment.

When the parties and Bechtel were unable to agree on the provisions of an appropriate protective order, Bechtel filed a Motion For Entry of a Protective Order, along with an affidavit establishing good cause for an order protecting its materials from unnecessary distribution. That Motion, pursuant to notice, was argued in open court on January 13, 1984. Subsequent to that hearing and following instructions from the court as to issues in dispute, Bechtel and the parties reached agreement upon the terms of the Protective Order As to Documents Produced by Bechtel (Petition at Appendix E) which the court entered in April 1984. Pursuant to the trial

---

[3] These materials contain, among other confidential data, information on construction, design and management techniques, financial data, methods of analyzing financial data, and other Bechtel techniques which give it a competitive edge in the highly competitive construction industry. Bechtel is understandably reluctant, for example, to allow the release of information which would severly undercut Bechtel's ability to successfully bid construction projects by allowing its competitors to take advantage of Bechtel's experience as a leader in the industry and its unique methods of estimating costs and other such items (*See supra* note 2.).

court's discovery procedures and in total reliance upon the protective order, Bechtel to date has produced over 800,000 pages of its documents to Consumers and Dow for review and has delivered copies of approximately 1.2 million pages to the parties.

The protective orders entered by the trial court expedited the discovery process and allowed the case to proceed to trial only sixteen months after the litigation was instituted. Absent the protective orders, this case would most likely still be in the discovery stage. If Bechtel had thought that its materials could subsequently be opened to public inspection, it would have pursued document-by-document confidentiality rulings prior to releasing its proprietary documents. The protective orders eliminated the necessity of such a cumbersome and expensive process by preserving the confidentiality of the materials subject to challenge by Dow and Consumers. The protective orders allowed efficient production of documents in the first and most time-critical phase of discovery, so that the depositions and interrogatories, many of which were keyed to documents previously produced, could follow.

Petitioner sought to intervene in the underlying suit several months after entry of the protective orders and after production of documents in reliance on the protective orders was underway. After the matter was fully briefed, the Midland County Circuit Court denied Petitioner's demand for intervention (made solely for the purpose of obtaining access to all pretrial discovery information) on the basis of Michigan procedural law (Petition at Appendix B).

Although Petitioner's request to intervene was denied, it and other members of the media were nonetheless allowed complete and contemporaneous access to the entire adjudicative process. Media representatives were in attendance at virtually every trial session and were actually handed copies of trial exhibits by representatives of the parties as those materials were introduced into evidence. When requests were made

to seal trial documents, the media, including Petitioner, through their respective counsel, were allowed to file opposing briefs and to present oral arguments. Petitioner was given a meaningful opportunity to challenge these requests. In fact, no trial documents were sealed nor were any trial sessions closed to the press or public.

On appeal, Petitioner claimed to have a First Amendment right of access to non-adjudicative discovery materials produced by Respondents and the parties. Respondents maintained throughout that this Court's ruling in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) established that the public and press have *no* First Amendment right of access to private non-adjudicative discovery materials. The Michigan Court of Appeals, agreeing that *Seattle Times* resolved the issue, denied Petitioner's complaint for superintending control, and did not find an abuse of discretion on the part of the trial court in entering the protective orders (Petition at A-3). This decision focused on Michigan's history of private discovery proceedings and the traditional right of the trial court to control its processes. The Michigan Court of Appeals also agreed that the trial court properly interpreted Michigan law in denying Petitioner's request to intervene solely to obtain private, non-adjudicative documents. The Michigan Supreme Court declined to disturb these findings.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no issue presented in the instant case with respect to adjudicative documents. Petitioner enjoyed full and immediate access to all documents received into evidence or relied upon in the adjudicative process and had total access to all trial hearings. Therefore, the sole issue presented for consideration is Petitioner's allegation that denial of access to

private, proprietary, non-adjudicative discovery materials constituted a violation of Petitioner's First Amendment rights. Contrary to Petitioner's contention, this Court has already determined in *Seattle Times* that there is *no* First Amendment right of access to the non-adjudicative civil pretrial discovery materials sought by Petitioner in the underlying suit.

The decision of the Michigan Court of Appeals is in accord with *Seattle Times* and presents no conflict with decisions of the Circuit Court of Appeals. Accordingly, the Petition for Writ of Certiorari should be denied.

I.

THE DECISION OF THE MICHIGAN COURT OF APPEALS DOES NOT ABRIDGE ANY CONSTITUTIONAL RIGHTS AND IS IN ACCORD WITH THE APPLICABLE DECISIONS OF THIS COURT

In *Seattle Times* this Court recognized a substantial governmental interest in *not* extending the public's right of access to civil pretrial discovery materials. Indeed, this Court made it clear that there is *no* First Amendment right of access to non-adjudicative civil pretrial discovery materials:

> . . . [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.

467 U.S. at 33.

This Court has continually emphasized the necessity of establishing two threshold requirements *before* a First Amendment right of access to various judicial processes will be recognized. First, the process must have traditionally been open to the public

at common law. Second, such "openness" must be a "positive factor in the proper functioning of the judicial system." *Press-Enterprises Co. v. Superior Court of California*, ___ U.S. ___, 106 S.Ct. 2735, 2741-42 (1986) ("*Press-Enterprises II*"). See also, *Richmond Newspapers v. Virginia*, 488 U.S. 555, 564-580 (1980) and *Seattle Times Co. v. Rhineheart*, 467 U.S. at 31-36.

Applying the first part of this analysis in the civil context, this Court observed in *Seattle Times*:

> Moreover, pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law. . . . and, in general, they are conducted in private as a matter of modern practice. . . .

467 U.S. at 33 (citations omitted). Clearly, there is no historical or common law foundation to support a First Amendment right of access to civil pretrial discovery. The Michigan Court of Appeals, cognizant of Michigan's long history of private civil pretrial discovery[4], reached the same conclusion.[5]

With respect to the second part of the access analysis, this Court in *Seattle Times* also made it clear that open civil pretrial discovery would *not* play a significant positive role in the functioning of that process. Indeed, this Court stated that there is a substantial need for allowing the exercise of discretion by trial

---

[4] *See e.g. Schmedding v. May*, 85 Mich. 1, 48 N.W. 201 (1891) and *Park v. Detroit Free Press*, 72 Mich. 560, 40 N.W. 731 (1888).

[5] Petitioner's attempt to diminish the importance of historical access is unsupportable. This Court continues to rely on historical access as an important part of its analysis in access cases. In *Press-Enterprises II*, this Court relied heavily on California's history of allowing access to criminal pretrial hearings as justification for recognizing a public First Amendment right of access to such proceedings (106 S. Ct. at 2741-42). This continued emphasis of historical access as part of the analysis negates Petitioner's claim and supports the validity of the Michigan Court of Appeals' analysis.

courts to control discovery and, through the use of protective orders, safeguard the rights of producing parties under the broad and liberal parameters of modern discovery practice:

> Rule 26 [referencing Rule 26 of the Washington Civil Rules which the Court considered substantially identical to Fed. R. Civ. P. 26], however, must be viewed in its entirety. Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b) (1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.

467 U.S. at 34–35.[6] Public access to the civil discovery process would only serve to enhance the potential for abuse already recognized by this and other courts.[7] As stated by this Court, the proper functioning of the judicial process requires that trial courts be granted wide latitude in the use of protective orders to prevent the harm which could result from the widespread dissemination of discovery materials:

> There is an opportunity, therefore, for litigants to obtain — incidentally or purposefully — information that not

---

[6] The applicable Michigan General Court Rule 306.2 (reproduced in the Petition at p. 2-3), is substantially similar to the Washington discovery rule at issue in *Seattle Times* and to Fed. R. Civ. P. 26.

[7] *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34, fn 20.

> only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. . . . The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is sufficient justification for the authorization of protective orders. . . . The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery. The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.

467 U.S. at 35–36 (footnotes omitted).

Nowhere is this principle better illustrated than in the context of this case due to the millions of pages of material involved. The trial court was faced with the almost impossible task of facilitating economical and efficient discovery without the time and expense of individual privilege and confidentiality rulings on each and every document produced. Such rulings would have skyrocketed litigation expenses and imposed lengthy delays.[8]

Public access to the civil pretrial discovery stage, especially to documents produced by non-parties such as Bechtel, would not only increase the cost of litigation, but would impose even greater hardships on producing non-parties and result in a waste of precious judicial resources. There can be no serious question that public access to pretrial discovery would have a severely *negative* impact on the proper functioning of the judicial process.

---

[8] Petitioner itself acknowledged that the purpose of the protective orders was to make "information freely and easily available to adversaries" (Booth Newspaper, Inc.'s Motion to Intervene and Vacate Protective Orders at p. 5).

Moreover, this Court in *Seattle Times* recognized a substantial governmental interest in preserving the integrity of the civil discovery process by allowing trial courts to exercise wide discretion in the use of protective orders:

> It is sufficient for purposes of our decision that the highest court in the State found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law.

467 U.S. at 37. Further, this Court found not only that the potential for abuse which attends modern discovery practices *alone* justifies the use of protective orders, but also that the trial court is in the best position to decide which and when such protective orders are necessary. 467 U.S. at 35-36.

The trial court properly exercised its discretion in this case. The Michigan Court of Appeals did not find that the trial court abused its discretion in entering the protective orders. In accordance with the policy stated in *Seattle Times*, since there was no finding of an abuse of discretion by Michigan's highest reviewing court, the exercise of discretion by the trial court should not be reviewed further by this Court. This is especially true since there is no First Amendment right of access implicated.

II.

THERE IS NO CONFLICT BETWEEN THE DECISION OF THE MICHIGAN COURT OF APPEALS AND DECISIONS OF THE CIRCUIT COURTS OF APPEALS

Petitioner mistakenly attempts to demonstrate a conflict between decisions of the Sixth and Seventh Circuits and the decisions of the Michigan Court of Appeals and the D.C. Circuit in *In re the Reporters Committee for Freedom of the Press*, 773

F.2d 1325 (D.C. Cir. 1985), citing to *Brown & Williamson Tobacco Corp. v. Federal Trade Commission*, 710 F.2d 1165 (6th Cir. 1983) and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984).[9] The decisions of the Sixth and Seventh Circuits, however, relate only to rights of access to adjudicative materials which is *not* an issue here. The Michigan Court of Appeals affirmed a denial of access *only* as to non-adjudicative documents. Petitioner was, in fact, accorded the access rights recognized by the Sixth, Seventh and D.C. Circuits.

Petitioner is unable to cite to any decision which conflicts with *Seattle Times* or which supports its claim of conflict. Indeed, the circuits have followed this Court's lead in *Seattle Times* without conflict. (*See e.g., Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir. 1986); *In re the Reporters Committee for Freedom of the Press*, *supra*; *Bank of America National Trust and Savings Assoc. v. Hotel Rittenhouse Associates*, 800 F.2d 339 (3d Cir. 1986); *Oklahoma Hospital Association v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984).[10]

---

[9] Petitioner also cites to the decision in *Plaquemines Parish v. Delta Development*, 472 So.2d 560 (La. 1985) to support its claim of conflict. The sole issue before the Louisiana Supreme Court was whether the trial court abused its discretion in entering a protective order and the propriety of the intermediate appellate court's action in expanding the order on appeal. The Louisiana Supreme Court's decision was further restricted by the unique factual circumstances presented in that case upon which its analysis was premised, 472 So.2d at 563.

[10] While some of these decisions deal with adjudicative documents, they nonetheless evidence the fact that *Seattle Times* is clearly understood and uniformly applied.

III.

THERE IS NO REVIEWABLE ISSUE WITH RESPECT TO THE DENIAL OF PETITIONER'S REQUEST TO INTERVENE IN THE PROCEEDINGS BELOW

Petitioner sought to intervene at the trial court level for the sole purpose of obtaining the non-adjudicative fruits of discovery. The trial court correctly determined that Petitioner had no right of access to those materials and that Petitioner's basis for seeking intervention was insufficient under Michigan law. Michigan law allowed intervention as of right only to those persons who could be bound by a judgment rendered in those proceedings.[11] As the trial court stated:

> Although those seeking intervention are engaged in the business of selling information to their subscribers, they have no greater right of access to information claimed to be public than any other individual in this society. . . . Under these circumstances, to grant these applicants intervention for the purpose of access alone would require that intervention be granted not only in this case, but in any other case to any curious citizen. (Petition at B-5).

The logic in this is clear. Unless an intervenor has an interest in the substance of the lawsuit sufficient to put it at risk in terms of a judgment rendered in that proceeding, there is no justifiable reason for granting the intervenor the rights accorded parties in the discovery process.

In any event, notwithstanding the technical nuances of Michigan intervention law, the fact is that Petitioner had a full and fair opportunity to object to the protective order and to challenge any and all requests to seal adjudicative materials.

---

[11] Petitioner does not challenge the constitutionality or validity of the applicable intervention rule, Michigan General Court Rule 209 (reproduced in the Petition at Appendix K).

Nothing more is required. The denial of Petitioner's request to intervene is thus not properly an issue here.

CONCLUSION

Respondents, Bechtel Power Corporation and Bechtel Associates Professional Corporation, respectfully request that the Court deny Petitioner's Writ for Certiorari.

Respectfully submitted,

CLARK, KLEIN & BEAUMONT

Laurence M. Scoville, Jr.
Counsel of Record
J. Walker Henry
Mark L. McAlpine
Lenora P. Ledwon
1600 First Federal Building
Detroit, Michigan 48226
(313) 965-8300

Counsel for Respondents Bechtel Power Corporation and Bechtel Associates Professional Corporation

Date: November 26, 1986

No. 86-679 (3)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

BOOTH NEWSPAPERS, INC.
Petitioner

v

MIDLAND CIRCUIT JUDGE,
DOW CHEMICAL COMPANY,
CONSUMERS POWER COMPANY,
BECHTEL POWER CORPORATION
AND BECHTEL ASSOCIATES
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

BRIEF OF RESPONDENT CONSUMERS POWER COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BARRIS, SOTT, DENN & DRIKER
By: EUGENE DRIKER (P12959), *Counsel of Record*
MORLEY WITUS (P30895)
211 West Fort Street, 15th Floor
Detroit, MI 48226
(313) 965-9725
Attorneys for Consumers Power Co.

THE AMERICAN PRINTING COMPANY
615 SECOND AVENUE, DETROIT, MICHIGAN 48226 — (313) 963-9310

42 pp

QUESTION PRESENTED FOR REVIEW

Do non-parties have a constitutional right to obtain pre-trial discovery documents in civil litigation, when the documents have not been introduced into evidence at trial or submitted to the judge?

PARENTS, SUBSIDIARIES, AND AFFILIATES OF RESPONDENT CONSUMERS POWER COMPANY

— CMS Cogeneration Company

— CMS Engineering Company

— Conar Corporation

— Huron Hydrocarbons, Inc.

— Michigan Gas Storage Company

— Northern Michigan Exploration Company

— Plateau Resources Limited

— Canyon Homesteads, Inc.

— Selective Collection Services, Inc.

— Utility Systems, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—(Cont'd)

STATEMENT OF THE CASE

The underlying lawsuit between The Dow Chemical Company ("Dow") and Consumers Power Company ("Consumers") involves claims arising out of a contract dispute concerning the construction of the Midland Nuclear Plant. At the joint request of the parties on October 20, 1983, December 20, 1983 and April 6, 1984, the Midland County Circuit Court entered standard protective orders to maintain the confidentiality of documents produced in discovery containing sensitive commercial information. On July 16, 1984 the circuit court entered a protective order sealing all deposition transcripts in the case.

On July 20, 1984, petitioner Booth Newspapers, Inc., along with the Midland Publishing Co. and Michigan Press Association, filed a motion to intervene and a motion to vacate the four protective orders. The circuit court denied the motions on August 8, 1984. Although the court based its decision on procedural grounds, the court noted that *none* of the discovery materials in question were available even to the court itself (including the deposition transcripts stored in the courthouse), so they remained entirely private. Petition at B-2, fn 1.

On August 13, 1984 Petitioner filed a complaint for superintending control in the Michigan Court of Appeals, seeking reversal of the protective orders and the order denying intervention. The parties to the underlying lawsuit, Dow and Consumers did *not* appeal and did not ask the court of appeals to vacate or modify the protective orders.

Then on August 31, 1984 the circuit court entered a fifth protective order, prohibiting the parties from using any information obtained in discovery for any purpose other than trying this case. Petitioner asked the court of appeals to review this fifth protective order in its appeal as well.

Shortly after the petitioner filed its complaint in the court of appeals, trial began in the underlying lawsuit in the Midland Circuit Court, on October 12, 1984. The trial was completely open to the press and public and petitioner reported extensively on the evidence coming out at trial.

On September 3, 1985 (after the trial had been in progress for almost a year), the Michigan Court of Appeals dismissed the complaint for superintending control and affirmed all the circuit court orders. The court of appeals ruled that (1) petitioner had no standing to complain of the orders preventing the parties from releasing documents obtained in discovery; (2) even if stored in the courthouse, deposition transcripts and discovery materials are not public records, so outsiders do not have a right of access; and (3) intervention was correctly denied under the court rules. The court of appeals did not find any procedural irregularity or abuse of discretion in the entry of the protective orders.

Petitioner then filed an application for leave to appeal with the Michigan Supreme Court. The Michigan Supreme Court denied the application on April 28, 1986, and, subsequently, denied petitioner's motion for reconsideration.

Petitioner suggests that the protective orders were entered without giving the parties any opportunity to be heard, and without any consideration whether there was good cause for their issuance. Petition at 5-9, 13. The parties stipulated to the entry of the first three protective orders, yet there was also an extensive hearing on January 13, 1984 on the scope of these orders. The court explicitly found good cause, stating that the confidentiality orders in this complex case would have a salutary effect in expediting full and forthright discovery, by not exposing the parties to attack by outsiders trying to use the documents in other forums. Transcript 1/13/84, pp. 28, 59 (Appendix A).

Similarly, as to the fourth protective order, the parties were given an opportunity to be heard in open court regarding the subject of sealing the deposition transcripts at the pretrial conference of April 30, 1984. At that time the judge ruled that depositions are not public proceedings and advised that he had instructed court personnel that the transcripts were "to remain sealed *until such time as they are offered in evidence or used at trial, at which time they would be unsealed.*" (Emphasis supplied) Transcript, 4/30/84, p. 5 (Appendix B). Both parties expressly agreed with the Court's ruling that the deposition transcripts should be sealed and the depositions should remain private. *Id.* Thus, the fourth protective order, issued July 17, 1984, just repeated in written form the court's prior ruling on the record, to which no one had objected. Indeed, the order sealing the deposition transcripts merely formalized the longstanding practice of the Midland County Circuit Court in *all* cases, which was to keep depositions sealed until used at trial. See Affidavit of James R. Rood (Appendix C) and Petition at B-2, n. 1.

Similarly, the fifth protective order merely formalized the court's prior rulings from the bench. The merits of the order had already been addressed on the record by the parties and the court. On several occasions the court had deplored the prospect of leaking discovery documents to the media and using the lawsuit in a public relations campaign; the court repeatedly reminded the parties the discovery process was intended for trial preparation only and admonished them not to use discovery for other purposes outside the courtroom. Transcript, 4/30/84, pp. 25-26 (Appendix D).[1] Thus the entry

---

[1] In a May 24, 1984 letter to the parties the court again explained the "good cause" for sealing the depositions and prohibiting dissemination of discovery documents:

> I felt that leaking, directly publicizing, or use of information obtained by the discovery process in this cause, in other pending matters, was a misuse of the discovery proceedings. . . . It is of extreme impor-

Footnote 1 continued on page 4

of the fifth order on August 31, 1984 again was merely a recapitulation of the court's previous instructions to the parties, so it needed no new separate hearing or finding of good cause.

As noted above, the underlying trial began on October 12, 1984, and continued (with periodic breaks) until it was recessed on September 17, 1986 so Dow and Consumers could put the final touches on a business arrangement settling the lawsuit. All court proceedings have been completely open, and assiduously covered by the press. All the facts about the nuclear plant were brought out at trial, which generated over 26,000 pages of transcript and several thousand exhibits. The press and public have had absolute access to all testimony, documents, and deposition transcripts introduced into evidence — including those which had been previously made confidential by the protective orders. Once put in evidence, the parties routinely provided copies of documents or exhibits to the press (including petitioner) if they expressed any interest.

The protective orders at issue did not limit the media's right to interview any deposition witnesses, or to ask a party or witness to inspect and copy its documents which it produced in discovery. None of the circuit court orders placed any restraint on the press to publish whatever it wanted. Finally, none of the orders in any way restricted access to evidence introduced at trial.

Footnote 1 continued from page 3

tance to the expeditious handling of this litigation that all parties feel free to cooperate fully with the court in disclosing to other litigants all relevant facts and documents relating to this proceeding. The fear of unauthorized use of discovered material will certainly chill voluntary production of information. I urge all parties to use information obtained by the discovery process *only* for trial preparation.

Appendix E.

SUMMARY OF ARGUMENT

In *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), this Court flatly stated that discovery is not and never has been open to the public: "pretrial depositions and interrogatories are not public components of a civil trial." 467 U.S. at 33. Accordingly, the public has no right of access to discovery — indeed, even "a litigant has no First Amendment right of access to information made available for purposes of trying his suit." 467 U.S. at 32. Consistent with this Court's pronouncements in *Seattle Times*, no federal court has held that the press or public has a constitutional right of access to pretrial discovery in civil cases.

Realizing that there is no serious question for certiorari, petitioner seeks to obscure the orders actually issued by the circuit court. So, in order to raise an issue that might warrant this Court's attention, petitioner misleadingly suggests that this case involves a denial of access to *trial* documents. But the circuit court orders only denied public access to raw discovery materials not yet placed before the court for its consideration; the circuit court ordered that as soon as the materials were presented at trial or on motion, they became public. The issue of suppressing trial evidence is purely hypothetical and is not presented by the facts of this case.

ARGUMENT

I. THE ISSUE IS ACCESS TO RAW DISCOVERY MATERIALS; THE PRESS AND PUBLIC WERE NOT DENIED ACCESS TO TRIAL EVIDENCE

To the extent the Petition is based on the protective orders actually entered in this case, there is no issue worthy of this Court's attention; indeed, there is absolutely no authority for overturning the orders. To the extent that the

Petition does raise a legal issue arguably worthy of this Court's attention, that issue is not presented by the protective orders in this case.

Recognizing that there is no authority to support a right of access to pretrial discovery materials not put in evidence, petitioner falsely implies that the circuit court orders barred access to evidence introduced at the trial itself. Petitioner begins by saying the issue is a denial of "access to evidence admitted at a civil trial, . . ." Petition at 3. Petitioner declares the case concerns "Protective Orders that Suppress Trial Documents . . . ," Petition at 10, and petitioner's entire argument is framed in terms of an alleged denial of "access to trial documents," Petition at 18. *However, none of the circuit court orders in any way restricted public access to trial evidence or exhibits.* On the contrary, each of the confidentiality orders expressly allows for the disclosure of any discovered materials once they are made part of the public record at trial or in a motion or brief. Petition ¶3 on C3, ¶3 on D3, ¶6 on E4, and G1. See also Appendix B. By their own terms, the orders do not apply to trial evidence.

In fact, with one minor exception, the circuit court *never* ordered that any trial evidence be sealed or suppressed.[2] Nor did the court ever deny any request by the press or public to inspect documents admitted at trial. Once in evidence, the parties, with the circuit court's blessing, treated formerly confidential documents as in the public domain, routinely allowing the press (including petitioner) to copy or inspect any documents of interest. Petitioner never was denied access to trial testimony or exhibits.

---

[2] Approximately one hour of testimony of one witness was received *in camera* so that the court could determine the validity of a non-party's claim that its business documents contained trade secrets. The court ruled that no trade secrets were evident and the documents were thereafter received in evidence without any restriction. The media thereafter published a number of these documents.

At one point petitioner acknowledges that none of the protective orders at issue here extend to matters admitted at trial, quoting the court of appeals. Petition at 20, n. 5. But petitioner suggests the court of appeals extended the "life" of the orders, thereby sealing trial evidence from public view. *Id.* In fact, the court of appeals did *not* modify the circuit court orders but merely affirmed them and dismissed petitioner's complaint.

In *obiter dicta* the court of appeals did remark that until a case is over there is no right of physical access to trial exhibits and evidence in the possession of the judge (although there would be access during the trial to the extent the court clerk has possession). Petition at A-6. Of course, this issue is not in any way presented in this case, since none of the circuit court orders said anything about limiting access to trial exhibits and the circuit court never issued any order sealing trial exhibits or preventing public access to the trial record. So, while a right of access to trial exhibits during the pendency of a case might make for an interesting issue, any consideration of it in this case would be purely advisory and hypothetical.

As part of this strategem to get the Court's attention, petitioner falsely insinuates the "a blanket of secrecy" has been placed over this case, Petition at 23, and "the documents which might have explained this debacle were all hidden from public view." Petition at 17-18. Members of the press and public attended every day of trial and the trial was covered extensively in the newspapers. The public evidence comprised hundreds of volumes of testimony and exhibits concerning the Midland nuclear plant. Further, to the extent any previously sealed documents or depositions were presented in the courtroom or used in evidence, they became a matter of public record and the media of course had complete freedom to report on them. Moreover, the press routinely was given full access to any trial exhibits of interest.

simply by asking the parties or their trial counsel. In a significant sense, the Petition is moot now that all the evidence has come out at trial.

II. THIS COURT'S DECISIONS REFUTE THE ASSERTION OF A CONSTITUTIONAL RIGHT OF ACCESS TO PRE-TRIAL DISCOVERY

Petitioner first argues that this Court's decisions in *Seattle Times Co* v. *Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), and *Press Enterprise Co.* v. *Superior Court of California (Press-Enterprise II)*, 478 U.S. ___, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986), establish a qualified First Amendment right of public access to discovery in civil litigation. Petition at 10-21.

Petitioner has perversely misread the *Seattle Times* decision. *Seattle Times* in fact conclusively establishes that there is *no* First Amendment right of access to civil pretrial discovery. In *Seattle Times*, this Court unequivocally held that:

> *A litigant has no First Amendment right of access to information made available only for purposes of trying his suit. . . . Moreover, pretrial depositions and interrogatories are not public components of a civil trial.* Such proceedings were not open to the public at common law, and, in general, they are conducted in private as a matter of modern practice. . . . *Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction in a traditionally public source of information.*
>
> 467 U.S. at 32-33 (citations omitted; emphasis supplied).

If a litigant has no First Amendment right of access to information made available in discovery, a non-litigant certainly has no First Amendment right of access to such information.

If discovery is not open to the public, there certainly is no public right of access. In short, this Court's emphatic pronouncements in *Seattle Times* flatly contradict petitioner's argument.[3]

Seattle Times did hold that a litigant's First Amendment right to speak is implicated by a protective order restricting his dissemination of information obtained in discovery. 467 U.S. at 34. The order on appeal prohibited the Seattle Times newspaper, a party to the lawsuit, from publishing the information it had obtained through pretrial discovery. This Court declared that no constitutional rights are implicated by denying the press access to discovery, but the First Amendment is involved when a party is prevented from disseminating information it already had access to by virtue of discovery. 467 U.S. at 32.[4] On the issue of a litigant's right to speak and publish, the court found the First Amendment did apply, although "to a far lesser extent" than in other contexts. 467 U.S. at 34.[5]

---

[3] Also in *Seattle Times*, 467 U.S. 20 at 33, this Court cited the following with approval:

> Similarly, during the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than *wholly private to the litigants*. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence.
>
> *Gannett Corp.* v. *DePasquale*, 443 U.S. 368, 396, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (Burger, C.J., concurring) (emphasis supplied).

[4] See *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) ("[*Seattle Times*] did not involve a claim by the public to *access*, but rather a claim by one of the parties of the right to *disseminate* information acquired in the course of pretrial discovery").

[5] The Court held that if supported by ordinary "good cause," confidentiality orders restricting a party's right to speak will be approved since the constitution requires nothing more. 467 U.S. at 37. Further, "[i]t is sufficient . . . that the highest court in the state found no abuse of discretion in the trial court's decision to issue a protective order." *Id.*

In sum, *Seattle Times* declared there is no constitutional or common law right of access to discovery, but a party does have an attenuated constitutional right to publish information once obtained in discovery.

Petitioner only asserts a right of access, since none of the orders restricted its freedom to publish. Thus, according to *Seattle Times*, the First Amendment is inapplicable. This Court clearly did not suggest that outsiders to the litigation would have any right to obtain a hearing or review as to discovery orders which did not restrict their freedom of speech. Petitioner of course cannot assert the free speech rights of the parties bound by the court's confidentiality orders. The parties have not appealed the orders restricting their freedom of speech, so even the minimal First Amendment scrutiny of *Seattle Times* is not warranted here.

Petitioner next argues that *Press-Enterprise II* extended the First Amendment right of access so as to necessarily include civil discovery. Petition at 13-17. The holding of *Press-Enterprise II* was simply that a qualified First Amendment right of access attached to certain *courtroom* proceedings in a *criminal* trial (i.e., a preliminary evidentiary hearing to determine whether there was probable cause to bind the accused over for trial). The magistrate had closed the courtroom during the *41 day* hearing, and sealed the transcript record. This Court noted that "the preliminary hearing functions much like a full scale trial." 92 L.Ed.2d at 9. Obviously, the instant case is completely different: this is a civil, not a criminal, case, and there was no denial of access to any evidence presented to the judge or to any court proceedings.

Nor does the two-prong analysis in *Press-Enterprise II* yield petitioner's conclusion that there is a public right of access to the raw fruits of discovery in a civil case. According to *Press-Enterprise II*, the first test for determining whether a First Amendment right of access attaches is

whether "there has been a tradition of accessibility," 92 L.Ed.2d at 11, that is, "whether the place and the process has historically been open to the press and general public," 92 L.Ed.2d at 10. *Seattle Times* conclusively answered this question in the *negative* with regard to civil discovery. *Seattle Times*, 467 U.S. at 33 (discovery was "not open to the public at common law" and it is not a "traditionally public source of information"). It is absolutely clear that historically civil discovery has never been open to the press and public, nor is it open as a matter of contemporary practice. *In re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985) ("[i]t can thus hardly be said that there was a tradition, or is even now a general practice, of public access to pretrial depositions"); *United States* v. *Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986).[6] Recognizing this, petitioner does not even attempt to argue that this first step in the right of access analysis could be satisfied as to civil discovery.[7]

The second factor in determining whether a First Amendment right attaches is "whether public access plays a significant positive role in the functioning of the particular process in question". 92 L.Ed.2d at 10. Noting that "there are some kinds of government operations that would be totally frustrated if conducted openly," 92 L.Ed.2d at 10, the

---

[6] Indeed, in 1985 the Michigan Supreme Court adopted a court rule which *prohibits* discovery materials or depositions from being publicly filed with Michigan courts, except in connection with a motion or trial. MCR 2.302(h)(1) (Appendix F). Similar rules currently obtain in numerous state and federal courts across the country.

[7] Instead, petitioner asserts that the second factor (which petitioner calls the "structural factor") was "particularly decisive" in *Press-Enterprise II*, Petition at 14, and that this Court placed "overwhelming reliance on the 'structural factor'" Petition at 16. Petitioner ends up referring simply to "[t]he 'structural factor' analysis adopted by *Press Enterprise II*." Petition at 17. In other words, the first, historical, factor disappears altogether in petitioner's reading. Petition at 9-10.

court in *Press-Enterprise II* found a right of access because public access to criminal *trials* plays "a particularly significant role in the actual functioning of the process," and "preliminary hearings are sufficiently like a trial to justify the same conclusion," 92 L.Ed.2d at 12.

Obviously, this reasoning does not apply to the exchange of information in civil discovery, which plainly is not in any way analogous to a criminal trial. The only functional justifications for a right of access accepted by this Court have focused on judicial decision-making in criminal cases — fostering the integrity of fact-finding and the appearance of fairness, checking judicial abuses, and providing a cathartic opportunity for the community to observe justice being done. *In Re Reporters Committee*, 773 F.2d at 1336-7. Even assuming these functions are as important in private civil litigation, they are *entirely* irrelevant to pretrial discovery which is conducted by the litigants and third parties without any judicial involvement and where no judicial decision-making takes place.[8]

---

[8] But of course, unless and until introduced into evidence, the raw fruits of discovery are not in the possession of a court. If the purpose of the common law right of access is to check judicial abuses, . . . then that right should only extend to materials upon which a judicial decision is based.

Wilk v. *American Medical Ass'n*, 635 F.2d 1295, 1299 n.7 (2nd Cir. 1981).

The same factors that support a right of access to judicial records and other public documents — the public's right to know and the public interest in insuring that judicial proceedings are conducted fairly, to name but two — simply are not implicated where the materials were obtained by a party through discovery but have not yet been filed with the court.

In re Agent Orange Product Liability Litigation, 96 F.R.D. 582, 584 (E.D. N.Y. 1983).

Since as a matter of fact there never has been any public access to civil discovery, by definition such access cannot perform "a particularly significant positive role in the actual functioning of the process." It is *privacy* which plays the central role in the functioning of the discovery process. Especially in complex cases, confidentiality promotes swift and forthright discovery, and avoids wasteful discovery disputes. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983). In the judgment of every court that has considered the matter, public access would hamper, if not destroy, the expeditious functioning of the discovery process.

Discovery, whether civil or criminal, is essentially a private process . . . .

If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe.

United States v. *Anderson*, 799 F.2d at 1441.[9]

As this Court declared, "[l]iberal discovery is provided for the *sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.*" *Seattle Times*, 467 U.S. at 34 (emphasis supplied). In other words, this Court has recognized that civil discovery does not serve any purposes similar to criminal trials which require public participation. Civil discovery is a device to help resolve private claims, not to generate information for public consumption. The purpose of discovery "would be totally frustrated if conducted openly."

---

[9] *Anderson* held that there is no First Amendment right of access to a bill of particulars and notice of similar acts evidence filed by the government as part of court-ordered discovery in a *criminal* case, and therefore neither the press nor public was entitled to a hearing before these materials were sealed.

In sum, the two step analysis of *Press-Enterprise II* lends absolutely no support to petitioner's claimed right of access to discovery in private civil litigation.

III. NO DECISION OF ANY FEDERAL CIRCUIT SUPPORTS THE PETITION

Petitioner's second argument is that the decision of the Michigan Court of Appeals is in conflict with decisions of the Sixth and Seventh Circuits of the federal Court of Appeals. Here, petitioner prefers to ignore the actual facts of the case and switches to a hypothetical case involving an order limiting access to trial exhibits.

Notably, petitioner does not claim that the circuit court orders themselves are inconsistent with a decision of any federal court of appeals, since these orders only restricted access to pretrial discovery. Instead, petitioner hitches its argument to the gratuitous comment in the Michigan Court of Appeals decision suggesting that a trial judge *could* lawfully restrict access to trial exhibits or evidentiary materials in his personal possession — *but the trial judge in this case never did this*. The actual *holding* of the Michigan Court of Appeals was that there was no error in the trial court's orders regarding the confidentiality of *discovery materials*. Its decision was simply to affirm. Neither the court of appeals decision to affirm nor the protective orders themselves conflict with any federal court of appeals case.

Petitioner relies on two cases, *Brown & Williamson Tobacco Corp.* v. *Federal Trade Comm'n*, 710 F.2d 1165 (6th Cir. 1983), and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Petitioner acknowledges that *at most* these cases adumbrate a constitutional right of access to "materials admitted into evidence." Petition at 24. This gives the game away.

Brown & Williamson concerned evidentiary materials submitted to the court and did not even tangentially express any view as to a right of access to documents exchanged in discovery and not part of the court record. The court thus observed "the public has a strong interest in obtaining the information contained *in the court record*." 710 F.2d at 1180 (emphasis supplied). The Sixth Circuit's decision did not concern a seal on pretrial discovery materials, but a seal on the entire administrative record which was on appeal.

Since *Brown*, the Sixth Circuit decided *United States* v. *Beckham*, 789 F.2d 401 (6th Cir. 1986), which squarely refutes the notion that it would consider the discovery orders in this case as implicating any constitutional rights. In *Beckham*, the court held that as long as the media and public were not excluded from the courtroom during trial and there were no restrictions on their freedom to publish, there was no *constitutional* right of access to tape recordings, transcripts of the recordings, or documentary exhibits introduced in a criminal trial. *Id.* at 407, 409. (The court did hold that in a criminal case there was a qualified common law right of access to copy materials admitted into evidence.) *A fortiori*, since there is no First Amendment right of access to *trial exhibits* in a *criminal* case, there is no First Amendment right of access to discovery materials not admitted into evidence in a civil case.

In the other case relied on by petitioner, *Continental Illinois Securities Litigation*, the Seventh Circuit held that a conditional right of access attaches to hearings held and evidence presented on a dispositive pretrial motion in a civil case. The court explicitly founded this right of access on the fact that the documents to which the press sought access had been *admitted into evidence and relied on by the court in its decision*. *Id.* at 1304. The Seventh Circuit has since explained that no right of access would be involved in a protective order covering information produced in discovery.

In *Ball Memorial Hospital* v. *Mutual Hospital Insurance*, 784 F.2d 1325, 1346 n. 2 (7th Cir. 1986) the court declared that medical price data were properly subject to confidentiality orders because: "The data were not introduced into evidence, and therefore the presumption that evidentiary matters will be available to the public does not apply."

In short, no federal court of appeals holds that nonparties have a First Amendment right of access to documents produced in discovery and not introduced into evidence or presented to the court for a decision. On the other hand, a multitude of decisions hold that *at least* until introduced into evidence at trial, there is absolutely no constitutional right of access to discovery documents or depositions.

Most significantly, in a comprehensive recent opinion authored by Judge (now Justice) Scalia, the Court of Appeals for the District of Columbia unanimously held that there was no constitutional right of access to discovery documents or depositions in a civil case, even if they are filed with and used by the court in a summary judgment hearing.[10] The court said:

> We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions. . . . *[M]aterial placed before the court in connection with summary judgment motions is not constitutionally required to be open to the public* . . . .
>
> * * *
>
> We therefore find that until May 2, 1983 and May 20, 1983, [when judgment was entered] respectively, the Dis-

[10] Judge Skelly Wright *agreed* there was no right of access to pretrial materials not admitted into evidence, but he dissented from the majority's further holding that before judgment there was no right of access to exhibits admitted into evidence at trial. *Id.* at 1341, 1347.

trict Court could, without violating the First Amendment to the Constitution, refuse the reporters access to the materials at issue in the two cases. *The reporters thus had no First Amendment entitlement to a document-by-document determination of the need for confidentiality prior to those dates.*

In Re Reporters Committee, 773 F.2d at 1338-1339 (emphasis supplied).

As the court declared in *Cippollone* v. *Liggett Group*, 785 F.2d 1108, 1119 (3rd Cir. 1986): "*the first amendment is simply irrelevant to protective orders*" (emphasis supplied). Other recent cases are in complete agreement: there is no constitutional basis for the press or public to challenge confidentiality orders during discovery. *E.g.*, *Houston Chronicle Publishing Co.* v. *Hardy*, 678 S.W.2d 495, 10 Med.L.Rptr. 1841, 1843 (Tex. Civ. App. 1984) ("counsel cites not a single case, state or federal, which holds directly that raw pretrial depositions, taken in a civil case, which have never been offered in evidence upon a future trial is subject to access, as a matter of right"); *Oklahoma Hospital Ass'n* v. *Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir. 1984); *In re Alexander Grant & Co. Litigation*, 629 F.Supp. 593 (S.D. Fla. 1986).

IV. THERE ARE OTHER GROUNDS FOR AFFIRMANCE

Finally, even if there were an arguable First Amendment issue presented by this case, there are several independent grounds for affirming the circuit court orders. As the court of appeals noted there were three other issues:

> (2) Whether the trial court abused its discretion in the issuance of the protective orders; (3) whether the trial court erred in its denial of intervention by the plaintiffs; and (4) whether superintending control is the appropriate remedy for plaintiffs to seek in this case.
>
> Petition at A-2.

In the interest of brevity, these will not be detailed here. Suffice to say that these provide substantial alternative grounds for the dismissal of petitioner's complaint and further compelling reasons why it would be improvident to grant certiorari in this case.

CONCLUSION

The arguments and authorities in the Petition would only be relevant if the circuit court had denied access to trial evidence or exhibits, and the petitioner had filed a challenge to such orders. Then there might be a genuine controversy worthy of this Court's attention. But that is not the case here. The circuit court's orders only applied to discovery documents until such time as they were used at trial. The press and public had full access to all trial testimony and exhibits.

A constitutional right of access to pretrial discovery would create an unprecedented invasion of outside parties into the discovery process. No federal court has ever approved such a right of access. The Petition should be denied.

Respectfully submitted,

BARRIS, SOTT, DENN & DRIKER
By: EUGENE DRIKER (P12959), *Counsel of Record*
MORLEY WITUS (P30895)
211 West Fort Street, 15th Floor
Detroit, MI 48226
(313) 965-9725
Attorneys for Consumers Power Co.

DATE: November 21, 1986

APPENDIX A

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

File No. 83-002232-CK-D

CONSUMERS POWER COMPANY,
Defendant.

MOTION OF BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES PROFESSIONAL CORPORATION FOR ENTRY OF CONFIDENTIALITY PROTECTIVE ORDER RE BECHTEL DOCUMENTS AND IN RESPONSE AND OPPOSITION TO DOW'S MOTION TO COMPEL

MOTION OF DOW CHEMICAL TO COMPEL BECHTEL TO PRODUCE AND COPY DOCUMENTS

Proceedings had in the above-entitled cause before the Honorable David Scott DeWitt, Circuit Court Judge, at the Midland County Courthouse, Midland, Michigan, on Friday, January 13, 1984.

APPEARANCES:
KIRKLAND & ELLIS
BY: SAMUEL A. HAUBOLD, ESQ.,
HERBERT H. EDWARDS, ESQ.,
Appearing on behalf of the Plaintiff.

BARRIS, SOTT, DENN & DRIKER
BY: EUGENE DRIKER, ESQ., and
SHARON M. WOODS, ESQ.,
Appearing on behalf of the Defendant.

(28)

* * * are not attempting, or will we at any time, to inject any pro or antinuclear aspects into this case.

THE COURT: I understand that, but what they are worried about is the security of their documents from these people. And there has been a tendency already for various pro or antinuclear people to take great comfort in the suit instituted by The Dow Chemical Company against Consumers Power Company on the assumption that in some way there will be enough fallout from this litigation to be of assistance to them in establishing some sort of environmental impact on the continued construction of the plant. So that's not a dreamed-up concern, I don't think, and I think it is legitimate that we protect the interests of all the litigants with respect to outside struggles that they might have in this just purely private dispute between The Dow Chemical Company and Consumers Power Company.

MR. HAUBOLD: Your Honor, I certainly agree that those are irrelevant issues we should not get involved with in this case. But, by the same token, we should have the right to consult with qualified technical people without the fear that they feel, many of them, there may be retaliation against them if Bechtel or Consumers Power knows that they are somehow aiding Dow in the case. And these — we are not talking * * *

(59)

THE COURT: I would think so. You know, both — all parties and non-parties that we have represented in the room are being attacked on all sides by Philistines of every order. We got attorney generals and Ralph Nader and environmentalists. You're all under fire from one direction or another, and I suppose none of you want to make this litigation a field day for people that are — for one reason or another have an ax to grind against your particular organization or your industry or anything. And that's not the purpose of the discovery rules. So I think that you ought to be able to work out something.

MR. HAUBOLD: I think, your Honor, if I might say this, any individual or organization which we might consult are going to be recognized people in the field. The mere fact that Bechtel didn't like their testimony in a particular case or they testified against them is really —

THE COURT: I don't think that's — that wouldn't be the basis of a sustainable objection, as far as I'm concerned. If this particular individual has an interest that — where you could not rely on the material being used in this lawsuit alone, then that would be a legitimate reason for some concern. I am not saying that we might not, after balancing all those * * *

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs. File No. 83-002232-CK-D

CONSUMERS POWER COMPANY,
Defendant.

PRE-TRIAL CONFERENCE #2

Proceedings had in the above-entitled cause before the Honorable David Scott DeWitt, Circuit Court Judge, at the Midland County Courthouse, Midland, Michigan, on Monday, April 30, 1984.

APPEARANCES:
KIRKLAND & ELLIS
BY: WILLIAM R. JENTES, ESQ., and
SAMUEL A. HAUBOLD, ESQ.,
Appearing on behalf of the Plaintiff.

BARRIS, SOTT, DENN & DRIKER
BY: EUGENE DRIKER, ESQ., and
SHARON M. WOODS, ESQ.,
Appearing on behalf of the Defendant.

(5)

* * * it is then appropriate to raise those matters against the written transcript of the document.

That then leads into the second part of the matter and that is what to do with regard to depositions that are already taken and transcribed. So far none of those depositions, to my knowledge, I believe, have yet been filed with the Court.

THE COURT: Yeah, we have some filed. And, as a matter of fact, I've instructed the court personnel to follow the Court Rules, and those depositions are to remain sealed until such time as they are offered in evidence or used at the trial, at which time they would be unsealed.

MR. JENTES: All right. What is your Honor's feelings with regard to the presence of members of the press or third parties at depositions?

THE COURT: Well, in the first place, the depositions are not, unless they're taken de bene esse — but if they're for the purpose of discovery, the area of inquiry is wider than the area of inquiry that would be permitted at the trial, obviously, and they are not part of the proceedings and hence are not open to the public. Therefore, either party to the deposition proceedings can object to any third parties being present other than counsel, the witnesses, or —

(6)

counsel for the witnesses, counsel for the parties, counsel for the witness and the witness; and I think upon the objection of any party, then there would be no one else permitted. Of course, if everyone present consented to being — to the press being present, the Court would have no interest in that whatever. But it is — I think I have to protect the rights of the parties to exclude members — exclude anyone that I haven't mentioned from the proceeding.

MR. JENTES: All right. Thank you. I think that will give us some guidelines on that.

THE COURT: Anybody got any problem with that?

MR. DRIKER: That's satisfactory, your Honor.

MR. JENTES: I think the only other area that we discussed with Mr. Driker in advance, and on which we may have some disagreement, I don't know, is with regard to the use of documents that have been produced in the litigation but not subject to a protective order or documents that are obtained through other sources. For example, as your Honor knows, there's a very voluminous public record during the course of the NRC proceedings and are available also through the NRC offices as public documents.

The particular matter that appeared in the * * *

APPENDIX C

AFFIDAVIT

STATE OF MICHIGAN)
COUNTY OF MIDLAND) ss.

JAMES R. ROOD of 2516 Abbott Road, Apt. U-5, Midland, Michigan, County of Midland, State of Michigan, being first duly sworn, says:

1. That he served as the sole Judge of the 42nd Circuit Court of Midland County from 1968 to 1976.

2. That prior to and during his time on the bench in the Midland County Circuit Court, all discovery deposition transcripts filed by the litigants in civil cases were kept in the same sealed form as received by the Court Clerk's Office.

3. That prior to and during his time on the bench in the Midland County Circuit Court, all discovery deposition transcripts filed by the litigants in civil cases remained sealed until such time as they were offered in evidence or otherwise used to perpetuate testimony at trial or court hearings.

4. That prior to and during his time on the bench in the Midland County Circuit Court, the sealed depositions testimony and accompanying Exhibits filed by the litigants in civil cases were never regarded as part of the record available to the public or to me until such time as they were offered in evidence or otherwise used to perpetuate testimony at trial.

(s) JAMES R. ROOD

Subscribed and sworn to before me, a Notary Public, this 6th day of September, 1984.

(s) MARLA JEANNE RAHM,
Notary
County of Midland, Michigan
My Commission Expires: 11/17/87

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF MIDLAND

THE DOW CHEMICAL COMPANY,
Plaintiff,

vs.

File No. 83-002232-CK-D

CONSUMERS POWER COMPANY,
Defendant.

PRE-TRIAL CONFERENCE #2

Proceedings had in the above-entitled cause before the Honorable David Scott DeWitt, Circuit Court Judge, at the Midland County Courthouse, Midland, Michigan, on Monday, April 30, 1984.

APPEARANCES:
KIRKLAND & ELLIS
BY: WILLIAM R. JENTES, ESQ., and
SAMUEL A. HAUBOLD, ESQ.,
Appearing on behalf of the Plaintiff.

BARRIS, SOTT, DENN & DRIKER
BY: EUGENE DRIKER, ESQ., and
SHARON M. WOODS, ESQ.,
Appearing on behalf of the Defendant.

(25)

* * * to get this lawsuit tried expeditiously. I can start trying this lawsuit anytime after the 15th of July, and I think that the faster we get the thing tried in the proper forum, which is right here, right in this room, the less time we'll — or, the less concern we'll have for having the matter tried in the press by innuendo, by half truths, by — or any other way. In other words, gossip and rumor will end if we have a forum and a place where we can get to the matters that are actually involved in this lawsuit, and the press can accurately report what happens in a Courtroom.

So with respect to your contention, Mr. Driker, that you don't want to have Dow Chemical Company showing the documents around, we haven't had any situation where they've shown any documents that they've got in this proceeding. I certainly would regard it as an abuse of the discovery proceedings in this Court if documents were shown to parties without some legitimate connection to the preparation of a claim or a defense.

And I think with that kind of advice to all of you right here, I don't think I am going to have to go any further into this, because it's not my intention to try to run this lawsuit by gag rules and withholding things. But we all know — you are all very experienced * * *

and, I'm certain, ethical practitioners, and you all know the purpose of discovery is not for harassment. As a matter of fact, all the discovery rules are conditioned on giving the Court the power to relieve situations where the discovery is used in an harassing fashion.

So I don't think I'm going to have to enter an order, but I certainly am going to indicate to you that, as far as I'm concerned, it would be an abuse of this Court and its process to use the documents produced for discovery for any other purpose than having a legitimate connection with the preparation of a claim or defense. To show somebody a document who was not — where it was not necessary to prepare that person as a possible witness I don't think would be a proper use.

MR. JENTES: Thank you, your Honor. I can assure you that Dow has not done anything in violation of what your Honor says and we will not. And consistent with your desire to sort of move the thing along, I wonder if we might step onto agenda item 2, which Mr. Haubold will handle.

THE COURT: All right.

MR. HAUBOLD: Your Honor, Sam Haubold, with regard to agenda item 2, which is getting to the question of going through the discovery so that we can * * *

APPENDIX E

[Letterhead of Forty-second Judicial Circuit of Michigan]

May 24, 1984

KIRKLAND & ELLIS
200 East Randolph Street
Chicago, Illinois 60601

RE: *The Dow Chemical Company v Consumers Power Company*
File No. 83-002232-CK-D

Gentlemen:

I have Mr. Jentes' letter of May 3, 1984. Depositions taken pursuant to order of this court and/or pursuant to notice given in this cause are for discovery purposes in *this* case only. Rule 306.6(1) provides that the transcript of such depositions be "securely sealed" and filed in the court. I attempted at the April 30th hearing to impress upon the parties that I regarded depositions hearings as non-public unless all concerned agreed otherwise. I further indicated that I felt that leaking, directly publicizing or use of information obtained by the discovery process in this cause, in other pending matters, was a misuse of the discovery proceedings. I wish to make it clear that the misuse of the discovery process may result in the court restricting its availability to any party or parties who misuse the process.

It is of extreme importance to the expeditious handling of this litigation that all parties feel free to cooperate fully with the court in disclosing to other litigants all relevant facts and documents relating to this proceeding. The fear of unauthorized use of discovered material will certainly chill voluntary production of information. I urge all parties to use

information obtained by the discovery process *only* for trial preparation.

Yours very truly,

(s) David Scott DeWitt
Circuit Judge

DSD:mc
ccs: Herbert Edwards
CLARK, KLEIN & BEAUMONT
BARRIS, SOTT, DENN & DRIKER

APPENDIX F

"(H) Filing and Service of Discovery Materials.

(1) Unless a particular rule requires filing of discovery materials, requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If discovery materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion or an accompanying affidavit;

(b) If discovery materials are to be used at trial they must be either filed or made an exhibit;

(c) The court may order discovery materials to be filed."

Michigan Court Rules Rule 2.302(H)(1)

No. 86-679

In The Supreme Court of the United States

October Term 1986

BOOTH NEWSPAPERS, INC.
Petitioner

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

REPLY BRIEF OF PETITIONER

DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG
E. Edward Hood
Counsel of Record
Terrence E. Haggerty
Joan H. Lowenstein
315 East Eisenhower Parkway, Suite 100
Ann Arbor, Michigan 48104
(313) 663-3366
Attorneys for Petitioner

RENAISSANCE PRINTING, INC., 1133 GRISWOLD DETROIT, MICHIGAN 48226 (313) 964-3185

TABLE OF CONTENTS

INDEX OF AUTHORITIES

No. 86-679

In The
Supreme Court of the United States
October Term 1986

BOOTH NEWSPAPERS, INC.
Petitioner

v

MIDLAND CIRCUIT JUDGE, DOW CHEMICAL COMPANY, CONSUMERS POWER COMPANY, BECHTEL POWER CORPORATION AND BECHTEL ASSOCIATES
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

REPLY BRIEF OF PETITIONER

Booth Newspapers, Inc. replies to the briefs of respondents Consumers Power Company (Consumers) and Bechtel Power Corporation and Bechtel Associates Professional Corporation (Bechtel) in opposition to the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

In their briefs in opposition, respondents limit their argument to the issue of access to judicial records at trial. This restricted approach is inappropriate. The trial involving Consumers commenced before and has continued after the Michigan Court of Appeals decision to which the Petition for Certiorari is addressed. Proceedings at trial were not raised in

the Petition, nor are they relevant to this Court's evaluation of the appellate decision.

Respondent raises a second issue not discussed in the petition: the "privacy" of the civil proceedings which, they claim, justified circuit court and appellate court denial of access to civil pretrial discovery documents, including discovery materials used to support pretrial motions, without regard to good cause. This issue, likewise, is without merit.

ARGUMENT

1. Respondents' Emphasis Upon The Trial Proceedings Is Misleading And Irrelevant To The Petition

Respondent Consumers implies that all discovery documents relating to the nuclear plant were entered into evidence at trial, where the press had full and complete access. (Consumers Brief at p. 4). Consumers glosses over the fact that the trial has not been completed, having been adjourned for the purpose of settlement negotiations. Should trial resume, the trial judge may rely on the Court of Appeals decision, which holds that public access to the records of pending litigation can be denied until "the conclusion of proceedings on appeal, and the return of the record to the Circuit Court clerk." *Booth Newspapers, Inc. v. Midland Circuit Judge*, 145 Mich. App. 396, 404, 377 N.W.2d 868, 871 (1985). This holding sets a dangerous precedent of denying public access to documents and records at trial. Consumers' assertion that the Michigan Court of Appeals decision has nothing to do with trial documents is unfounded.

If the case is settled by a "business arangement"[1] (Consumers Brief at p. 4), that settlement will crystallize the importance of access to pretrial documents. Materials relating to charges of wrongdoing involving billions of dollars of taxpayers' money will be forever sheltered, even from the arguable scrutiny of a public trial.

Respondents' emphasis on the later trial and the access to trial exhibits that was accorded to the press and the public despite the appellate decision is irrelevant to this Court's review of that decision. At any time, access to judicial records, even at trial, could be denied under the auspices of the appellate decision. It is the appellate ruling which is precedent and which is the subject of the Petition for Certiorari, not anecdotal versions of the trial. For this reason, respondents' allusions to press access at trial are of no moment. This Court has long recognized the phenomenon of a topic being "capable of repetition yet evading review." *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 603 (1982). The Michigan Court of Appeals decision must be viewed in this light.

2. Respondents' Reliance On The "Privacy" Of Civil Litigation Fails To Recognize The Good Cause Requirement For Protective Orders

Throughout their briefs, resondents rely on what they call the "privacy" of depositions and other pretrial documents to support their contention that the trial and appellate courts acted properly in ignoring the requisite good cause standard necessary for entry of protective orders. Bechtel even refers to

---

[1] As outlined in the petition, the proposed settlement involves converting a multi-billion dollar nuclear power plant that does not function into a multi-billion dollar gas power plant, all at the expense of Michigan citizens and Consumers' shareholders.

the discovery documents petitioner seeks as "private, non-adjudicative[2] materials." (Bechtel Brief at p. 2). Consumers twice uses the word "outsiders" to allude to the public and the press regarding their interest in the Consumers-Dow litigation.

No litigation is entirely private. There is public cost to all litigation through use of the courthouse, judges and court reporters. All tort litigation revolves around breach of some duty. This concept of duty and breach is a public concept that clarifies societal roles. Public access to all aspects of the litigation produces the "community therapeutic value" referred to in *Press-Enterprise Co. v. Superior Court*, 478 U.S. ____, 92 L. Ed. 2d 1, 13 (1986). It is for this reason that discovery is presumptively open, requiring a showing of good cause to close it. Michigan General Court Rule 306.2 [now superseded by Michigan Court Rule 2.302(C)] required a motion for protective order and a judicial determination of good cause before entering such an order. There would be no reason for such prescription if discovery were already presumptively "private" as respondents contend.

This Court has recognized the presumptive openness of discovery by its holding in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), that a protective order must be accompanied by a showing of good cause. *Id.* at 37. In support of their contention that there is no First Amendment right of access, Consumers cites *United States v. Anderson*, 799 F.2d 1438 (11th Cir. 1986), a case based on an extravagant misreading of *Seattle Times*, that, treading backward, denied press access to *criminal* pretrial materials. Pretrial discovery is presumptively open

[2] The term "non-adjudicative" is particularly incorrect and misleading because, as is often the situation in civil litigation, in this case the parties introduced discovery materials and deposition excerpts in pretrial motions before the trial court. Dow's Motion to Vacate Trial Date, for instance, cited extensively from deposition transcripts subject to the protective orders.

under the federal rules and the Michigan rules and those rules require good cause to close it.

In addition to denying that there is a First Amendment right of access, Consumers also contends that there was good cause for the five protective orders. (Consumers Brief at p. 2). This claim is diametrically opposed to the factual record. Consumers admits that the parties stipulated to entry of the first three protective orders, hardly a compliance with the requisite judicial finding of good cause. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 102 n.16 (1981). Turning to the fourth protective order, Consumers bolsters petitioners' case by stating that the trial judge held an extensive hearing on the *scope* of those protective order (Consumers Brief at p. 2), not on whether they were properly entered under a good cause standard. The recitation as to the fourth and fifth protective orders, at page 3 of Consumers' Brief, explicitly shows that those orders were *faits accomplis,* a collaboration of the parties and a rubber stamp by the judge.

Even more self-serving is Consumers' thesis that sealing of transcripts is merely a "longstanding practice of the Midland County Circuit Court," supported by an affidavit to that effect from a retired judge. (Consumers Brief at p. 3). Respondent fails to cite any justification for this practice other than tradition. The tradition undoubtedly finds its source in the even more longstanding nonexistence of photocopying equipment, a modern convenience which now makes guarding of the original deposition under seal, lock and key an anachronism.[3]

---

[3] See Note. Access to Pretrial Documents Under the First Amendment, 84 Colum. L. Rev. 1813, 1826-27 (1984). Evidence presented by petitioner to the trial court also indicated the tradition arose to protect the court reporter's "chain of possession," to insure against tampering with the transcript.

CONCLUSION

Petitioner has not sought unrestrained access to discovery materials in all cases. However, *Seattle Times* requires at a consitutional minimum a balancing of interests, including First Amendment interests, to substantiate a showing of good cause. 467 U.S. at 37. Bechtel has argued that public access to discovery would increase costs of litigation and have a negative impact on the functioning of the judicial process (Bechtel Brief at p. 9) but has not explained why this would be so.

Consumers states a right of access to criminal pretrial proceedings "foster[s] the integrity of fact-finding and the appearance of fairness, check[s] judicial abuses and provide[s] a cathartic opportunity for the community to observe justice being done." [Consumers Brief at p. 12, quoting from *In Re Reporters Committee for Freedom of the Press*, 773 F.2d 1325, 1336–7 (D.C. Cir. 1985).] Neither respondent voices any legitimate reason for not applying such standards to civil litigation that involves issues of parmount public interest. The Petition for Certiorari should be granted.

Respectfully submitted,

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG
E. EDWARD HOOD
Counsel of Record
TERRENCE E. HAGGERTY
JOAN H. LOWENSTEIN
315 E. Eisenhower Parkway, Suite 100
Ann Arbor, Michigan 48104
(313) 747-7660
Attorneys for Petitioner